SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 765

GEO. F. ALGER COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2-3
Statute Involved	4
Questions Presented	4
Statement	6
Proceedings Below	6
The Axle Mile Tax	9
Ohio "No-Reciprocity" Policy	10
No Relief By Mandamus	12
The Federal Constitutional Questions Are Substantial	13
Conclusion	23

INDEX TO APPENDICES

Appendix "A"—(1) Opinion and Judgment of Supreme Court of Ohio Appealed From, Reported in 166 Ohio State 427, 148 N. E. (2d) 835 (June 19, 1957)	1a
Appendix "A"—(2) Opinion of Supreme Court of Ohio in Earlier Related Case, Reported in 164 Ohio State 122, 128 N. E. (2d) 97 (July 17, 1955)	9a
Appendix "A"—(3) Decision of Ohio Board of Tax Appeals in Case No. 35066 Before the Supreme Court of Ohio and Final Order of Tax Commission of Ohio Incorporated Therein	29a

Page

Appendix "A"—(4) Decision of Ohio Board of Tax Appeals in Case No. 35067 Before the Supreme Court of Ohio on Final Order of Tax Commission of Ohio Incorporated Therein..... 37a

Appendix "B"—Verbatim Text of Ohio Axle Mile Tax Law as Amended (Title 57, Rev. Code of Ohio Chap. 5728, pp. 274 et seq.; Ohio Code Supplement, pp. 38 et seq.)..... 46a

INDEX TO AUTHORITIES CITED

Cases:

Capitol Greyhound Lines v. Brice, 339 U. S. 542, 543, 549 (1950).....3, 9, 14, 16

Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653, 655 (1948)..... 3, 8

Charleston Federal Savings & Loan Assn. v. Alderson, 324 U. S. 182, 187 (1945)..... 3

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 288-290 (1921)..... 8

Dixie Ohio Express Co. v. Commissioner, 306 U. S. 72 (1939)..... 14

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 143-144 (1940) 21

Flournoy v. Wiener, 321 U. S. 253, 263 (1944).... 3

Greenough v. Tax Assessors of Newport, 331 U. S. 486, 490 (1947)..... 3

Holden v. Hardy, 169 U. S. 366, 390 (1898)..... 20

Interstate Motor Freight System v. Bowers and Geo. F. Alger Co. v. Bowers, 164 Ohio State 122, 128 N. E. (2d) 97 (July 27, 1955)..... 10-11

	Page
Largent v. Texas, 318 U. S. 418, 421 (1943)	12
Peters v. Hobby, 349 U. S. 331, 345 (1955)	20
Prudential Insurance Co. v. Cheek, 259 U. S. 530, 547 (1930)	3
Railroad Commissioner of California v. Pacific Gas & Electric Co., 302 U. S. 388 (1938)	21
Smith v. Cahoon, 283 U. S. 553, 566-7 (1931)	3, 18
Southern Railway Co. v. Virginia, 290 U. S. 190 (1933)	21, 22
Southern Railway Co. v. Greene, 216 U. S. 400, 417 (1910)	18
State ex rel. Interstate Motor Freight System et al. v. O'Neill et al., 167 Ohio State 139, 146 N. E. (2d) 720 (December 18, 1957)	12
Sweezy v. New Hampshire, 354 U. S. 234 (1957)	19
Yick Wo v. Hopkins, 118 U. S. 356, 366-7 (1886)	20

Statutes:

Ohio Axle Mile Tax Law, Secs. 5728.01-5728.15 (Revised Code of Ohio)	2, 4, 5, 7, 9, 11, 12, 14, 19, 22
Revised Code of Ohio:	
Sec. 4503.37	10
Sec. 5717.02	2, 6
Sec. 5717.04	2, 7
Sec. 5728.99	4
Sec. 7246-50	17
United States Code:	
Title 23, Sec. 23 (a)	15
Title 28, Sec. 1257 (2)	3, 8
Title 49, Sec. 301 et seq.	4

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No.....

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellant, Geo. F. Alger Company, appeals from a final judgment of the Supreme Court of Ohio which affirmed two decisions of the Ohio Board of Tax Appeals upholding two final orders of Appellee, Tax Commissioner of the State of Ohio, and submits this statement in compliance with this Court's Rules 13(2) and 15.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 166 Ohio State 427, 148 N. E. (2d) 835, and its opinion in an earlier related case is reported in 164 Ohio State 122, 128 N. E. (2d) 97*. The two decisions of the Board of Tax Appeals and the two final orders of the Tax Commissioner (R. 76, 83) affirmed by the Supreme Court of Ohio are not reported.

Copies of said opinions, decisions and final orders, and of said final judgment appealed from, are set forth in Appendix A hereto.

JURISDICTION

This appeal involves proceedings, pursuant to Rev. Code of Ohio, Sec. 5717.02 and Sec. 5717.04, for review of two tax assessments covering different periods made by Appellee against Appellant under the so-called Ohio Axle Mile Tax Law as amended, Rev. Code of Ohio, Sec. 5728.01 *et seq.*, which were determined separately until they reached the Supreme Court of Ohio, whose opinion and

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*The record below before the Supreme Court of Ohio included by stipulation the records, the transcripts of testimony and exhibits in two prior cases before the Ohio Board of Tax Appeals reviewed in the earlier related decision of the Supreme Court of Ohio referred to in the text. Throughout this Jurisdictional Statement references to pages of the printed record before the Supreme Court of Ohio in the present case will be cited as "R. —"; references to pages of the transcript of testimony in Board of Tax Appeals cases Nos. 27151 and 27152, which is Exhibit 1 in Board of Tax Appeals case No. 30565, will be cited as "Tr. —"; and references to Exhibits 2 through 17 and A through K in Board of Tax Appeals case No. 30565 and Exhibits 101 through 109 in Board of Tax Appeals case No. 32604, will be by number as "Ex. —".

final judgment in both cases was entered on June 19, 1957 (Appendix A). Appellant's timely application for rehearing was denied on December 18, 1957. Notice of Appeal to this Court was filed in the Supreme Court of Ohio on March 14, 1958.

The statutory provision conferring on this Court jurisdiction of the appeal herein is 28 U. S. C. §1257 (2).

The judgment of the Supreme Court of Ohio appealed from constitutes a final judgment of the highest court of Ohio sustaining, against claims timely asserted of repugnancy to the Constitution of the United States, the validity of a State tax statute, namely said Ohio Axle Mile Tax Law, both generally, and specifically as applied under a "no reciprocity" policy of Appellee and other State officials as below set forth. The following decisions are particularly relied on as sustaining this Court's jurisdiction of this appeal: *Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 543, 549 (1950); *Smith v. Cahoon,* 283 U. S. 553, 557 (1931); *Greenough v. Tax Assessors of Newport,* 331 U. S. 486, 490 (1947); *Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 653, 655 (1948); *Flournoy v. Wiener,* 321 U. S. 253, 263 (1944); *Prudential Insurance Co. v. Cheek,* 259 U. S. 530, 547 (1930); *Charleston Federal Savings & Loan Assn. v. Alderson,* 324 U. S. 182, 187 (1945).

STATUTE INVOLVED

The statute involved herein is the Ohio Axle Mile Tax Law as amended, Rev. Code of Ohio, Secs. 5728.01-5728.15 inclusive, and Sec. 5728.99 (Title 57, pp. 274 *et seq.*, Ohio Code Supplement, pp. 38 *et seq.*), the complete text of which is set out verbatim in Appendix B hereto. The statute imposes a tax, computed on the basis of mileage traveled in Ohio, with rates varying arbitrarily according to the type of vehicle and number of axles in excess of two, applied in this case to vehicles operated exclusively in interstate commerce.

QUESTIONS PRESENTED

Appellant, Geo. F. Alger Company (hereinafter sometimes called Alger), a Michigan corporation having its principal place of business at Detroit, Michigan, is a common motor carrier of general commodities, operating exclusively in interstate commerce pursuant to Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission under Part II of the Interstate Commerce Act, 49 U. S. C. Sec. 301 *et seq.* (R. 77, 84). Alger is authorized and required by its Certificates to operate in interstate commerce in five States, namely, Illinois, Indiana, Kentucky, Michigan and Ohio (Ex. 6). In said States it operates vehicles having three or more axles, registered in and with respect to which a tax is paid by it to States, including Michigan and Indiana, which levy a highway use tax in addition to motor vehicle registration fees, but with which States no reciprocal exemption agreements have been entered into by Ohio as authorized by Sec. 5728.15 of the Ohio Axle Mile Tax Law as the result of a

wholly arbitrary policy adopted by State officials not to make *any such agreements.* The challanged tax assessments under said statute were based upon the use by Appellant of highways in Ohio (almost 100% federal aid highways, Tr. 40, 364) exclusively in interstate commerce.

In the light of the foregoing, the principal questions presented are:

I. Whether said statute, on its face and generally as applied to Appellant and other similar interstate motor carriers is repugnant to the Commerce Clause or the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Federal Constitution because it is unreasonable and discriminatory, imposes an intolerable financial burden upon such motor carriers, unduly burdens and restricts the free flow of interstate commerce, and imposes taxes far in excess of and having no reasonable relation to fair compensation to Ohio for use by such carriers of such highways in said State.

II. Whether said statute, as applied and construed in this case with respect to assessments covering Michigan- and Indiana-registered vehicles, is unconstitutional and void under the Fourteenth Amendment and the Commerce Clause of the Federal Constitution because such assessments were levied pursuant to a fixed policy, adopted at the outset and applied by Appellee and other State officials, of destroying existing reciprocal exemption agreements with respect to the Ohio Axle Mile Tax and of rejecting and refusing to make *any* reciprocal exemption agreements as authorized by Section 5728.15 of said statute, such policy being arbitrary, and inflexible, and in conflict with the objectives and not subject to the control of the Legislature of the State of Ohio, thereby depriving

Appellant and others similarly situated of property without notice and hearing and without due process of law, and unduly burdening interstate commerce.

STATEMENT

Proceedings Below

In Case No. 35066 below, Appellee made an assessment against Alger under the Ohio Axle Mile Tax Law of $5,881.70* for the period April 1, 1954 to June 30, 1954 (R. 76). Later, in Case No. 35067 below, another assessment was made by Appellee against Appellant of $30,122.75 for the period October 1, 1955 to December 31, 1955 (R. 83). Both assessments relate to vehicles operated by Alger as a common carrier moving exclusively in interstate and foreign commerce into, out of or through Ohio (R. 4). The assessment in Case No. 35067 below related to vehicles licensed in Michigan and Indiana as well as in Ohio (R. 4). As to each assessment, Alger filed with Appellee a petition for reassessment under Ohio Rev. Code, Section 5717.02, contending that such statute and the assessments thereunder violated the Federal Constitution (R. 79, 88). In each case Appellee entered a final highway use tax assessment order in the respective amounts above set forth, plus a penalty (R. 76, 83).

Thereupon Alger in each case appealed to the Board of Tax Appeals of Ohio contending, *inter alia,* that the statute generally and in its specific application by Appel-

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*The original assessment of $34,142.26 was reduced by $27,378.31 as a result of the effect of the reciprocal exemptions upheld in the earlier related case (Appendix A).

lee herein violated the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution (R. 77-78; 85-88). In each case the Board of Tax Appeals affirmed the final order of Appellee, refusing to pass upon the constitutional issues (R. 82; 90).

Thereupon Alger appealed to the Supreme Court of Ohio in accordance with Ohio Rev. Code, Sec. 5717.04, contending in Notices of Appeal (filed December 28, 1956) and by appropriate Assignment of Errors that the statute violated the Commerce Clause as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Federal Constitution (a) generally, as applied to interstate motor carriers including Appellant (see Assignment of Errors, Brief, pp. 2-7; also Brief pp. 13-89), and (b) specifically, because the assessment in Case No. 35067 was levied pursuant to an arbitrary policy of Appellee and other Ohio officials of entering into *no* reciprocal tax exemption agreements with other States with respect to the Ohio Axle Mile Tax, notwithstanding that such reciprocal agreements were specifically authorized and contemplated by Sec. 5728.15 (See Assignment of Errors, Brief, pp. 6-7; also Brief, pp. 131-159, particularly pp. 157-158).

The Supreme Court of Ohio affirmed both orders of the Board of Tax Appeals, holding with respect to the first constitutional contention that the tax bears a reasonable relationship to the purpose for which it was created, does not impair interstate commerce, and is not discriminatory (143 N. E. (2d) at p. 837).

With respect to the second constitutional contention relating to Section 5728.15, without considering the evidence of record, the Supreme Court ruled expressly only that said Section imposed no mandatory duty to enter into reci-

procity agreements upon the officials authorized and empowered to do so (143 N. E. (2d) at p. 839). It is clear, however, that the Supreme Court of Ohio necessarily passed on *both* constitutional issues, since the Court opinion states, in its final paragraph (treating the case as a whole), as follows (143 N. E. (2d) at p. 839):

> "Having determined that such tax is a valid exercise of the taxing power, that the reciprocity board has the power to cancel reciprocity agreements, and that there is no mandatory duty on the board created by Section 5728.15 Revised Code, to require it to enter into such agreements, we affirm the decisions of the Board of Tax Appeals."

Even if it be assumed, however, with respect to the constitutional issue relating to Section 5728.15, that the Supreme Court of Ohio treated the matter only as one of statutory construction, the jurisdictional requirements for the purpose of appeal under 28 U. S. C. Section 1257(2) are met under the principle of cases such as *Central Greyhound Lines, Inc. v. Mealey,* 334 U. S. 653, 655 (1948), and *Dahnke-Walker Milling Company v. Bondurant,* 257 U. S. 282, 288-290 (1921), since the determination of such constitutional issue, expressly raised by Appellant, was necessary to the Court's decision.

Thereafter, Appellant's Application for Rehearing, filed July 2, 1957, raising the above constitutional issues in the light of the opinion of the Supreme Court of Ohio (See Applic., pars. 9-19, 25-26), was denied under date of December 18, 1957. Notice of Appeal to this Court raising the same constitutional issues (See Notice, Part III) was filed on March 14, 1958.

The Axle Mile Tax

The principal section of the statute, Rev. Code of Ohio, Section 5728.06, imposes a tax varying arbitrarily with the kind of vehicle and number of axles in excess of two, wholly regardless of weight and entirely without regard to whether the vehicle be empty or loaded (Appendix B). Moreover, the Act arbitrarily imposes the tax on some axles but not on others. This destroys any relationship of the tax to fair compensation to the State of Ohio for the use of, or wear upon roads located therein. The senseless variations in the tax imposed, as shown in the record below (see Ex. 2), completely precludes the tax being justified under the principle of "rough approximation" upheld in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950).

This is the first case reaching this Court in which actual evidence of record has been introduced demonstrating that the tax in general and as applied to Appellant exceeds fair compensation for the state's share, if any, of costs of highways used in interstate commerce, in line with the *Brice* case.

The Supreme Court of Ohio, however, refused to consider the voluminous evidence in the record, to which Appellee offered no contradictory evidence, showing the tremendous and arbitrary variations in tax (Ex. 5), the impossible financial burden imposed by the tax upon Appellant (Ex. 10), and the overall excessiveness of highway taxes, including the Axle Mile Tax, collected by the State of Ohio in relation to its highway program (Ex. 5 and 5a). Instead, the Supreme Court merely said that such material **"would have better been directed to the General Assembly"** (143 N. E. (2d) at p. 836.)

Ohio "No-Reciprocity" Policy

As initially introduced in the General Assembly, the Axle Mile Tax Law did not contain any reciprocal agreement section. The General Assembly itself added Section 5728.15 to the bill as introduced, providing therein that the Attorney General, the Tax Commissioner (Appellee herein) and a member of the Public Utilities Commission:

> "• • • are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state, district or territory of the United States, which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of Sections 1 through 14 of this act the owner of every motor vehicle which is duly registered in any such state • • •"

with the proviso that owners and operators of Ohio-registered motor vehicles shall be reciprocally exempted from the motor vehicle tax and registration laws of such other State.

The Ohio Reciprocity Board, established under an earlier Ohio statute, Rev. Code of Ohio, Sec. 4503.37, had entered into a reciprocity agreement with Michigan dated October 26, 1937 exempting Michigan-registered vehicles from highway taxes levied by Ohio and in turn exempting Ohio-registered vehicles from Michigan highway taxes (R. 9; 37-45). There was a similar reciprocal agreement, dated December 23, 1937, amended March 30, 1944, between the States of Ohio and Indiana (R. 10; 46-58); and such agreements also existed between Ohio, all states adjacent to it, and many other States (R. 9; Tr. 298).

In said earlier related case, *Interstate Motor Freight System v. Bowers* and *Geo. F. Alger Co. v. Bowers,* 164

Ohio State 122, 128 N. E. (2d) 97 (July 27, 1955), the Supreme Court of Ohio held that the 1937 Michigan-Ohio reciprocity agreement precluded assessments against Appellant and others similarly situated under the Ohio Axle Mile Tax Law. Appellee and other Ohio officials concerned reacted promptly and drastically to this decision.

On August 9, 1955, a few days after said decision, the Ohio Reciprocity Board, by uniform notices to the various States, including Michigan and Indiana, with which Ohio had reciprocity agreements, cancelled all such agreements (R. 9-11; 59 *et seq.*), stating, in part, that this action was taken (R. 59-60):

> "• • • in order to make certain that none of our existing agreements constitute an impediment to the continued collection of these tax revenues.
>
> • • • • •
>
> "• • • The purpose of the amendment is to merely make certain that the language in our existing agreement does not apply to the Axle Mile Tax."

Appellee and the other Ohio officials designated to enter into reciprocal contracts and agreements under Section 5728.15 and the members of the older Ohio Reciprocity Board have applied, and continue to apply, a fixed, inflexible and entirely arbitrary "no-reciprocity" policy with respect to reciprocal contracts and agreements relating to the Ohio Axle Mile Tax Law. Pursuant to such policy they have:

> (1) sent uniform notices to every State with which Ohio had a reciprocal exemption agreement, canceling such agreements (R. 9; 59-62);
>
> (2) failed and refused to enter into a single reciprocal exemption agreement with any State as provided in Section 5728.15 (see R. 59-60);

(3) arbitrarily, and without stated reason, refused to sign on behalf of the State of Ohio a reciprocal exemption agreement signed and tendered to them by the proper officials of the State of Michigan, in accordance with the provisions of said Section 5728.15 (R. 12-16; 66-75), despite a statement by the Michigan officials that concurrence in the Ohio position would deny "Michigan citizens their inherent statutory rights by whim or caprice" (R. 63); and

(4) made a number of reciprocal agreements with various States providing exemption from other Ohio highway taxes, *but expressly excepting from exemption the Ohio Axle Mile Tax Law.*

No Relief By Mandamus

Appellant and others similarly situated are afforded no opportunity under the Ohio Axle Mile Tax Law or otherwise to be heard with respect to this "no-reciprocity" policy, or with respect to its application in the case of the Michigan-proffered reciprocity agreement or in the case of other eligible States such as Indiana. An attempt by an interstate carrier to test the "no-reciprocity" policy by mandamus was defeated when the Supreme Court of Ohio, in *State ex rel. Interstate Motor Freight System et al. v. O'Neill et al.*, 167 Ohio State 139, 146 N. E. (2d) 720 (December 18, 1957) approved denial of a writ of mandamus, on the basis of its opinion sought to be reviewed herein.

• • • • •

In view of all of the foregoing, this appeal furnishes the sole possibility of relief to Appellant with respect to the constitutional issues raised. Cf. *Largent v. Texas*, 318 U. S. 418, 421 (1943).

THE FEDERAL CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL

Never before has this Court considered a tax with variations based on the number of axles without regard to weight or load. Nor has this Court before been faced with the due process questions presented by the "no-reciprocity" policy herein described.

Dependent upon this appeal are many millions of dollars in tax payments under the Axle Mile Tax Law. Appeals by Appellant and other motor carriers similarly situated involving hundreds of assessments under the statute are pending before the Ohio Board of Tax Appeals and the Tax Commissioner, all of which have been stayed pending final decision by this Court on this appeal.

Both the issue as to the general unconstitutionality of the Ohio Axle Mile Tax Law, and its invalidity in relation to its application on the basis of the unlawful "no-reciprocity" policy, are substantial.

I

From the standpoint of invalidity of the statute generally as applied to Appellant and other similar interstate carriers, this case is unparalleled in several aspects:

(a) **The magnitude of the tax imposed directly by a state on transportation exclusively in interstate commerce.** On an annual basis, Alger's exclusively interstate operations would be subjected to a tax of at least $204,559 (Ex. 10; Tr. 56-62). This exceeds Alger's net profit for the year of only $157,792 derived from operations in five states (Ex. 10). Both the total tax and tax per vehicle far exceed any direct tax on motor carrier operations exclusively in interstate

commerce heretofore considered by this court. The total of $204,559 is 34 times or 3,400% of the total in *Dixie Ohio Express Company v. Commissioner*, 306 U. S. 72 (1939) and the maximum tax per vehicle of $2,250 (Ex. 5, p. 36) is 4½ times or 450% of that in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950). These amounts are fantastic by comparison wih the taxes "moderate in amount" previously levied on interstate motor carriers by states on the theory of fair compensation for the state's shares of the cost of the facilities used exclusively in interstate commerce, *Capitol Greyhound Lines v. Brice, supra.*

(b) The introduction and receipt of uncontroverted evidence of record showing that the total taxes, including the Axle Mile Tax, received by Ohio during 1954, **exceeds by more than $23,000,000** the revenues needed to finance the Ohio State Highway Program (see Ex. 5, p. 39).

(c) The introduction and receipt of uncontradicted evidence in the form of detailed **studies made by eminent experts,** who also testified, showing specifically that the Ohio Axle Mile Tax far exceeds fair compensation to the State of Ohio (Exs. 5, 5a; Tr. 13-22, 107-211, 211-269) within the meaning of the principle stated by this Court in *Capitol Greyhound Lines v. Brice, supra.*

(d) **The effect on the national welfare and national transportation policy of unrestrained retaliatory state taxation of interstate commerce** and the development of the very internecine state warfare which the Commerce Clause was designed to prevent. The arbitrary refusal of Appellee herein and other officials of the State of Ohio to enter into reciprocity agreements under the Axle Mile Tax Law as they are "authorized and empowered" to do by Section 5728.15, Revised Code of Ohio, has already resulted in retaliatory taxation of interstate commerce by more than seventeen states. Nu-

merous other states have readied or passed retaliatory tax levies on the interstate operations of Ohio carriers in such states. (See Staff Report House Document No. 449, 84th Congress, Second Session, Exhibit C—July 16, 1956—not printed.) Application of certain of these retaliatory levies is being withheld only pending decision in this proceeding. While the total additional amount is incalculable, it may safely be said to run into many millions and constitutes one of the most serious threats to the flow of commerce among the states ever posed.

(e) Specific evidence of record, in no way controverted, shows that application of the Axle Mile Tax to appellant's operations for the year 1953 would **turn its profit before taxes of $157,792.00 into a *loss* of $3,000.00** (Ex. 10; Tr. 55), and that if such tax were in existence in each of the five states served by Appellant, the tax would be $511,375.00, producing a *loss* of $309,825.00 (Ex. 10).

Under the Federal-Aid Highway Act of 1956 (23 U. S. C., Sec. 23(a), 62, 151 *et seq.*) the federal government has assumed 90% of the cost of interstate highways upon which almost all of Appellant's operations are performed, not only in Ohio, but also in the four other states in which it operates (Tr. 40, 364). Ohio, however, which now only pays 10% of the cost of the highways predominantly used by Appellant and others similarly situated, claims the right to collect an axle mile tax of up to $2,250 per vehicle and total highway taxes of up to $4,262 per vehicle from Appellant (Ex. 5). An entirely new question of *quid pro quo*, an exaction far in excess of Ohio's share of the cost of the facility furnished, is thus presented.

The evidence in the record below, completely disregarded by the Supreme Court of Ohio, serves clearly to

invalidate the Ohio Axle Mile Tax Law under both the majority and dissenting opinions of this Court in *Capitol Greyhound Lines v. Brice, supra.* In the majority opinion this Court stated (339 U. S. at 544):

> "Courts have invoked the Commerce Clause to invalidate State taxes on interstate carriers * * * upon finding that: * * * (3) the amount of the tax exceeded fair compensation to the State."

At page 547 of the majority decision in the same case it is said:

> "Our adherence to existing rules does not mean that any group of carriers is remediless if the total Maryland taxes are out of line with fair compensation due to Maryland. Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied."

And Mr. Justice Frankfurter, in his dissent (339 U. S. at 556) said:

> "* * * Under the guise of a special compensatory tax, however, a state may not exact more than the value of the services to be compensated."

In this case Appellant has made a record showing which invalidates the Ohio Axle Mile Tax Law, not only under the Commerce Clause, but also under the Fourteenth Amendment. The tax unit selected in the statute is the axle. But when the Act proceeds to impose a tax upon some axles but not others, unrelated to road wear or use, and taxes different axles at arbitrarily different rates, it presents on its face a most serious question of unconstitutional discrimination.

However, this case goes well beyond the face of the statute on this point. Under Ohio Law, all axles can carry the same maximum allowable weight, namely, 19,000 pounds (Rev. Code of Ohio, Sec. 7246-50; Ex. 2). The uncontradicted evidence in this case shows, and it was freely admitted by witnesses for the State of Ohio below, that Ohio highways utilized by Alger are all constructed to sustain an unlimited number of repetitive axle movements of said maximum permissible weight per axle (Tr. 127-8, 327, 403-409; Ex. 2). The record further demonstrates that the strain or wear produced by a 2-axle vehicle, at the point of contact with the surface of a highway, namely, the axle, is at least the same as that for a 3 or more axle vehicle or combination, and that actually the transportation of a load of freight by 2-axle exempt vehicles produces more stress upon highway surface than transportation of a load of freight of the same weight in a 3-axle vehicle, since the weight on the carrying axle of a 2-axle vehicle is greater (See Ex. 2, 5; Tr. 222, 228-230).

Studies (Ex. 5 and 5a) independently produced by outstanding highway engineers, namely, Mr. George B. Sowers of Cleveland, Ohio, and Dean Lawrence H. Archer of Ohio Northern University (with the late Professor John S. Worley of the University of Michigan), and the testimony of the witnesses in support thereof, graphically prove that factually the Ohio Axle Mile Tax is arbitrary and unreasonable in that greatly disparate amounts are payable with respect to various vehicles involving the same weight per axle and the same road use or wear, and that the tax, either standing by itself or in combination with other taxes paid to the State of Ohio, is in excess of and unrelated to fair compensation to the State of Ohio (Ex. 5; Tr. 250-260).

The overwhelming and uncontradicted evidence of record, therefore, expressly negates assumptions made by the Su-

preme Court of Ohio in the opinion below (See 143 N. E. (2d) at pp. 836-837), and shows clearly that the Act is wholly arbitrary. "But the constitutional guarantee of equal protection of the laws is interposed against discriminations that are entirely arbitrary." *Smith v. Cahoon,* 283 U. S. 553, 566-7 (1931). Where in establishing the classification, there is no proveable justification for the distinction, it becomes "wholly arbitrary", and constitutes "a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made' ", *Smith v. Cahoon, supra,* at p. 567.

As stated by this Court with regard to an Alabama tax statute:

> "* * * While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification." *Southern Railway Company v. Greene,* 216 U. S. 400, 417 (1910).

II.

Imposition of the Ohio Axle Mile Tax upon Appellant with respect to Michigan and Indiana registered vehicles is the direct and proximate result of the "no-reciprocity" policy above described. The opinion of the Supreme Court of Ohio sought to be reviewed herein approves that policy as proper under the Law. So construed and applied, the Ohio Axle Mile Tax Law violates fundamental due process requirements in a number of respects:

(a) Separation of Legislative Power from Control Thereof. If the decision of the Supreme Court of Ohio below is construed as meaning that the intent of the Ohio Legislature, in the enactment of the Axle Mile Tax Law with Section 5728.15 as a part thereof, was to authorize any reciprocity policy at all—including the "no-reciprocity" policy being applied by Appellee and the other officials of the State of Ohio—then the Act falls squarely afoul of the due process principle recently enunciated in the prevailing opinion of this Court in *Sweezy v. New Hampshire,* 354 U. S. 234 (1957). The conferring of such a completely uninhibited and uncontrolled discretion on Appellee and the other Ohio officials constitutes, in the language of the prevailing opinion in the *Sweezy* case, an unconstitutional "separation of the power of a State legislature * * * (to grant or deny reciprocal exemptions) from the responsibility to direct the use of that power insofar as that separation causes a deprivation of the constitutional rights of individuals and a denial of due process of law" (354 U. S. 234, at 255).

(b) Uncontrolled Administrative Arbitrariness. The most reasonable assumption as to the intent of the Ohio General Assembly with respect to Section 5728.15 is that the

legislature intended that reciprocal exemption agreements would be made with all eligible states, to avoid an undue burden on interstate commerce. But even assuming that the only legislative intent was that the designated officials should exercise their discretion as to whether to make or refuse to make specific agreements, the adoption of the undeviating and inflexible policy of refusal even to consider any reciprocal exemption agreements represents one of the most arbitrary and perverted exercises of power by Appellee and the other Ohio officials which could be imagined and nullifies the intent of the State's Legislature. The imposition of the heavy assessments upon Appellant on this basis represents precisely the kind of "administrative lawlessness" (Cf. *Peters v. Hobby,* 349 U. S. 331, 345 (1955)) which the Due Process Clause of the Fourteenth Amendment has been traditionally held to prohibit, as "power * * * not confided to their discretion in the legal sense of that term" but which "is purely arbitrary, and acknowledges neither guidance nor restraint". *Yick Wo v. Hopkins,* 118 U. S. 356, 366-7 (1886).

(c) Absence of "Fundamentals of Fair Play". The imposition of the extremely burdensome and prohibitive tax here involved on the basis of the "no-reciprocity" policy of Appellee and the other State officials operates to deprive Appellant of property (payment of tax) in violation of the most fundamental concept of due process, namely, "due notice and an opportunity of being heard", *Holden v. Hardy,* 169 U. S. 366, 390 (1898). Appellee and the other officials, pursuant to their "no-reciprocity" policy, have refused to sign the proffered Michigan agreement under which Appellant would be exempt (R. 12-16), and have been ruled by the Supreme Court of Ohio to be free of any requirement to account for their judgment in such

connection. But this Court has said that due process requires "that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143-144 (1940). As stated in *Railroad Commissioner of California v. Pacific Gas & Electric Co.*, 302 U. S. 388 (1938):

> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 304, 305. There must be due notice and an opportunity to be heard, * * *." (302 U. S. 388 at p. 393.)

Even if Appellee and said other Ohio officials are deemed to have the right to set their own standards as to whether or when reciprocal exemption agreements will be signed, they have never indicated what standard they have adopted for themselves in deciding on the "no-reciprocity" policy, and must, when deciding whether to accept or reject proffered agreements, accord interested parties, such as Appellant, the fundamental right to be heard, at least on whether acceptance or rejection will accomplish the objectives which Appellee and said others may purport to set for themselves. In *Southern Railway Co. v. Virginia*, 290 U. S. 190 (1933), this Court held unconstitutional a State statute interpreted as authorizing a highway commissioner to order abolition of railroad crossings, under a broad standard of public safety and convenience, without notice or hearing affording a railroad an opportunity to present its case with respect to a particular grade crossing ordered eliminated. In so doing this Court expressly held that, assuming a state legislature may operate by direct enactment,

> "* * * it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property * * *";

and pointed out that:

> "In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion." (290 U. S. 190, at pp. 197-8.)

As to the Commerce Clause, Appellant contends that the manifest purpose of the General Assembly of the State of Ohio, when it inserted Section 5728.15 in the Ohio Axle Mile Tax Law, was, by authorizing and empowering reciprocal exemption contracts and agreements, to avoid an undue burden upon interstate commerce. The arbitrary "no-reciprocity" policy of Appellee and the other Ohio officials, sanctioned by the opinion appealed from herein, defeats such legislative purpose and thereby operates to bring the statute, as applied to Appellant herein, within the interdict of the Commerce Clause.

CONCLUSION

This case is properly before this Court on appeal under 28 U. S. C. Section 1257(2), and the constitutional questions presented are substantial and of the utmost importance to the public as well as to Appellant tnd others similarly situated.

Probable jurisdiction should accordingly be noted.

Respectfully submitted,

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Dated: May 12, 1958.

APPENDIX A

(1) Opinion and Judgment of Supreme Court of Ohio Appealed From, Reported in 166 Ohio State 427, 148 N. E. (2d) 835 (June 19, 1957).

GEO. F. ALGER CO., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Opinion *Per Curiam.*

Taxation—Highway use tax—Axle-mile tax—Sections 5728.01 et seq., Revised Code, constitutional—Reciprocity agreements with other states—Subject to cancellation—Reciprocity board—Duty to enter into reciprocity agreements not mandatory—Section 5728.15, Revised Code—Power to cancel reciprocity agreements with other states—Section 4503.37, Revised Code.

(Nos. 35066 and 35067—Decided June 19, 1957.)

APPEALS from the Board of Tax Appeals.

These cases arose from the imposition of the Ohio highway use tax upon appellant, a Michigan corporation engaged in the business of trucking in interstate commerce with trucks licensed in Ohio, Michigan and Indiana.

The orders of the Tax Commissioner assessing the tax were appealed from to the Board of Tax Appeals, which found the assessments reasonable and lawful, and the decisions of the board are now before this court for consideration.

Mr. Edmund M. Brady and *Mr. Taylor C. Burneson*, for appellant.

Mr. William Saxbe, Mr. Hugh A. Sherer and *Mr. John M. Tobin*, for appellee.

Per Curiam. The Ohio Highway Use Tax Act, which tax is known as the axle-mile tax, levies a graduated tax

upon trucks, ranging from one-half to two and one-half cents per mile for trucks having three or more axles.

The appellant attacks the imposition of the tax on three grounds.

First, it contends that the tax itself is unconstitutional.

Second, it contends that certain designated state officers, herein called the reciprocity board, had no authority to cancel reciprocity agreements with the states of Michigan and Indiana which exempted it from this tax.

Third, it maintains that the reciprocity board created by the Highway Use Tax Act has the mandatory duty of entering into reciprocity agreements with the various states.

We will consider these questions in the above order.

The appellant devotes a great deal of its brief to a discussion of the relative effects on the highways of the state of the various types of trucks in relation to the number of axles and of the effect of the imposition of this tax on the economy of the truckers. This argument, although interesting, is one which would have better been directed to the General Assembly, since this court in determining the validity of the tax must confine itself to a determination of whether the tax is discriminatory, imposes an undue burden on interstate commerce and bears a reasonable relationship to the purpose for which it was created.

The appellant contends that this tax act is discriminatory, principally on the ground that it exempts from its operation trucks with only two axles and does not evenly graduate the tax among the trucks with more than two axles, in relation to the amount of weight which may be carried per axle. It is axiomatic that the General Assembly in imposing a tax has the power to make reasonable classifications therein exempting from the tax persons

who in some other way contribute their fair share to the maintenance of the operation for which the tax is imposed. In relation to the highway use tax, it was evidently the opinion of the General Assembly that the owners of trucks with only two axles carried their fair share of the cost of the operation and maintenance of highways through the imposition of the other motor vehicle taxes. It further must have determined that the relative damage to the highways increased proportionately with the number of axles. All these are questions of fact which must be determined by the General Assembly, and, its determination being neither unreasonable nor arbitrary, the court will not substitute its judgment for that of the General Assembly.

It may well be that there is not a mathematical exactness in the imposition of the tax, but this fact alone will not invalidate the tax. The United States Supreme Court, in *Capitol Greyhound Lines v. Brice, Commr.*, 339 U. S. 542, 546, 94 L. Ed., 1053, 70 S. Ct., 806, said:

"Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' "

Furthermore, an examination of this tax shows that there is no discrimination as between interstate and intrastate commerce, since the same formula is applied to both forms of commerce.

The next question which must be considered in determining the constitutionality of this tax is whether it bears a reasonable relationship to the purpose for which it was created.

So long as there is a reasonable relationship between the tax and the use, we cannot on this ground say such tax is invalid.

The evident purpose of this tax is to allocate to the commercial users of the state highways their proportionate share of the cost of construction and maintenance of such highways. The tax is designated for and the proceeds go into highways. There cannot be any question that the use of heavy trucks on highways substantially increases the deterioration of such highways, and it is certainly a reasonable exercise of the taxing power to impose a special tax on the persons causing such increased deterioration.

We having determined that the tax imposed here bears a reasonable relationship to the purpose for which it was created, does not impair interstate commerce and is not discriminatory, it follows that it is a valid exercise of the taxing power.

We come now to a consideration of the power of the reciprocity board under Section 4503.37, Revised Code, to cancel the reciprocity agreement between Ohio and Michigan entered into in 1937 by such board. Looking first to the agreement, we find the following language:

"The tax accrual period for and during which such taxes and fees may be thus waived shall commence with January 1, 1937, and shall continue until December 31, 1937, and thereafter until this compact and agreement shall be modified or altered between the contracting parties, or terminated by either on written notice first to be given to the other, of intent to terminate."

Thus it is evident from the agreement itself that the parties contemplated a right of cancellation.

This right of cancellation was recognized by this court in *Interstate Motor Freight System v. Bowers, Tax Commr.*, 164 Ohio St., 122, 128 N. E. (2d), 97, the first paragraph of the syllabus of which reads as follows:

"Where a statute creates a board of officers of a state with power and authority to enter into reciprocity agreements with the proper authorities of an adjoining state regulating the use on the roads and highways of the two states of trucks and automobiles and any other motor vehicles owned in such two adjoining states; and where such officers of the two adjoining states so authorized enter into a reciprocity agreement with respect to the operation of motor carriers operating between the two states whereby it is agreed that when outstate carriers as to either state secure reciprocity exemption cards or plates then such states shall severally waive and forego payment by their respective outstate motor carriers of license-plate taxes, including weight taxes for motor vehicles, and also mileage fees for their operation, which reciprocity agreement can be terminated by either state on written notice first to be given to the other of intent to terminate, and which agreement is not terminated but is in full force and effect between such states; and where one of such states at a later date enacts legislation whereby within its territorial limits a new and additional highway use tax is assessed on all motor carriers operating within such state, the rate of which tax is based on the number of the axles, and the amount of the tax is determined by the operation mileage of the motor carrier; the outstate motor carriers of the other state operating in interstate commerce through the state wherein such new highway use tax is imposed are exempted from such tax by reason of the terms of such reciprocity agreement still in force and effect between such states."

Since it is clear that such agreements are subject to cancellation, we are left with only the question as to who has the right to cancel.

The appellant argues that the board itself has no such power, but makes no suggestion as to the agency in whom such power reposes.

A state necessarily functions through its public officials and administrative bodies. It would be impracticable if not impossible for the General Assembly to perform all the functions necessary for the operation of the state. Recognizing the impracticability of a legislative body to attempt to negotiate reciprocity agreements with other states, the General Assembly provided for the creation of a reciprocity board to study and determine whether reciprocity agreements should be entered into with the various states, and provided, where the board so determines, that it may enter into agreements with other states, relating to reciprocal taxing. It seems elementary that, in the absence of any provision in the statute providing for a specific manner of termination, and where administrative bodies are given power to enter into agreements, they should be able to reserve the power, where conditions change and they determine that such agreements are no longer feasible and not to the best interest of the state, to cancel such agreements.

Thus under the circumstances of these cases it is our opinion that the reciprocity board created by Section 4503.37, Revised Code, had the power to cancel the reciprocity agreement entered into with the state of Michigan.

This brings us to a consideration of the final issue herein, that is, whether, under Section 5728.15, Revised Code, the reciprocity board has a mandatory duty to enter into reciprocity agreements with other states.

Section 5728.15, Revised Code, reads as follows:

"The Attorney General, the Tax Commissioner, and a member of the Public Utilities Commission, designated by the commission for that purpose, are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state, district or territory of the United States, which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of Sections 1 through 14 [Sections 5728.01 to 5728.14, Revised Code] of this act the owner of every motor vehicle which is duly registered in any such state, district or territory provided such owner has complied with the laws of the state, district or territory of his residence pertaining to the registration and taxation of motor vehicles and complies with such laws while operating and driving such motor vehicle upon the public roads or highways of this state, and provided further, that the owners and operators of motor vehicles registered in this state shall be exempt from all obligations pertaining to the registration and taxation of motor vehicles in such other state, district or territory.

"When an agreement or contract has been entered into pursuant to the provisions of this section the Attorney General shall cause a copy of such agreement or contract to be filed with the Registrar of Motor Vehicles."

It is the contention of the appellant that the General Assembly by the use of the phrase, "authorized and empowered," imposed a mandatory duty on the board created by this act to enter into reciprocity agreements.

An examination of the state tax structure shows a contrary intent. It must be remembered that the effect of reciprocity agreements is to exempt certain persons from taxes, and it is fundamental that exemptions from taxa-

tion are strictly construed. The General Assembly, if it had so desired, could have, in the act itself, provided for reciprocity. This it did in the sections relating to registration and licensing, as is shown by Section 4503.36, Revised Code. The General Assembly with this in mind failed to do so in respect to the axle mile tax but instead created a reciprocity board and authorized such board to enter into agreements; thus it was clearly not the intent of the General Assembly to have an automatic reciprocity with the other states in relation to the axle mile tax but instead left it to the discretion of and for the determination of the board.

An analyzation of the problem shows how unrealistic it would be to hold that such duty is mandatory. Although we could very well instruct the board that it must enter into such agreements, such agreements require the acquiescence of another state over which we have no control. In fact, in the present cases the board did offer an amended agreement to Michigan, which Michigan refused.

Having determined that such tax is a valid exercise of the taxing power, that the reciprocity board has the power to cancel reciprocity agreements, and that there is no mandatory duty on the board created by Section 5728.15, Revised Code, to require it to enter into such agreements, we affirm the decisions of the Board of Tax Appeals.

Decisions affirmed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT, MATTHIAS and HERBERT, JJ., concur.

APPENDIX A (Continued)

(2) Opinion of Supreme Court of Ohio in Earlier Related Case, Reported in 164 Ohio State 122, 128 N. E. (2d) 97 (July 27, 1955).

INTERSTATE MOTOR FREIGHT SYSTEM, APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

GEO. F. ALGER CO. ET AL., APPELLANTS, *v.* BOWERS, TAX COMMR., APPELLEE.

Taxation—Highway use tax—Motor transportation companies—Reciprocity agreements with other states—Effect of later enactment of axle-mile tax legislation—Tax Commissioner—Authority to refund taxes illegally or erroneously assessed—Section 5703.05, Revised Code—Constitutionality of statutory provisions not considered, when.

1. Where a statute creates a board of officers of a state with power and authority to enter into reciprocity agreements with the proper authorities of an adjoining state regulating the use on the roads and highways of the two states of trucks and automobiles and any other motor vehicles owned in such two adjoining states; and where such officers of the two adjoining states so authorized enter into a reciprocity agreement with respect to the operation of motor carriers operating between the two states whereby it is agreed that when outstate carriers as to either state secure reciprocity exemption cards or plates then such states shall severally waive and forego payment by their respective outstate motor carriers of license-plate taxes, including weight taxes for motor vehicles, and also mileage fees for their operation, which reciprocity agreement can be terminated by either state on written notice first to be given to the other of intent to terminate, and which agreement is not terminated but is in full force and effect between such states; and where one of such states at a later date enacts legislation whereby within its territorial limits a new and additional highway use tax is assessed on all motor carriers operating within such state, the rate of which tax is based on the number of the axles, and the amount of the tax is determined by the operation mileage of the motor carrier; the outstate motor carriers of the other state operating in interstate commerce through the state wherein such new highway use tax is imposed are exempted from such tax by reason of the terms of such reciprocity agreement still in force and effect between such states.

2. **Where a case can be determined upon any other theory than that of the constitutionality of a challenged statute, no consideration will be given to the constitutional question.**

3. **Under the provisions of Section 1464-3, General Code (Section 5703.05, Revised Code), the Tax Commissioner of Ohio is authorized and empowered to remit or refund taxes or assessments illegally or erroneously assessed or collected or for any other reason overpaid, with certain exceptions therein noted which are not applicable to the facts in this case, and on written application of any person claiming to have overpaid to the Treasurer of State, where the commissioner finds there has been an overpayment, he may issue a certificate of abatement to the taxpayer for such overpayment.**

(Nos. 34218 and 34407—Decided July 27, 1955.)

APPEALS from the Board of Tax Appeals.

In case No. 34218, the appellant, Interstate Motor Freight System, has appealed from a decision of the Board of Tax Appeals affirming an order of the Tax Commissioner refusing a claim for refund for taxes (sometimes referred to as the axle-mile tax) levied against it under the Highway Use Tax Act, Sections 5728.01 to 5728.15, inclusive, Revised Code, which taxes were claimed to have been paid erroneously.

The appellant is a Delaware corporation having its principal place of business in the city of Grand Rapids, Michigan, and is engaged in the transportation of property for hire as a common carrier by motor vehicle in interstate commerce over highways located within the state of Ohio and 16 other states of the United States, under authority by the Interstate Commerce Commission.

The appellant claims that the highway use taxes paid to the state of Ohio from October 1, 1953, to March 31, 1954, in the amount of $29,533.59, were erroneously paid for the reason that there is presently in existence a reciprocity agreement between the state of Ohio and the state of Michigan, dated October 26, 1937, under which agreement those states agree to waive and forego "li-

cense plate taxes, including weight taxes for motor vehicles and also mileage fees for their operations including Ohio taxes levied under the provisions of Sections 614-94, 614-112, 6291, 6292 and 6293, and any connected provisions of the Ohio General Code, or which may be levied or payable in lieu of such provisions."

The matter was submitted to the Tax Commissioner who, in denying the refund, held in part as follows:

"The Tax Commissioner finds it unnecessary to ascertain the validity or existence of the alleged agreement of October 26, 1937, since by the provisions of Section 15 of the Highway Use Tax Act (Amended Substitute House Bill No. 619, Section 5728.15 of the Revised Code) the Legislature has provided the manner in which reciprocal agreements relating to the highway use tax law may be effected. The Tax Commissioner finds that said section is controlling over any existing reciprocal agreements that may be in effect between Ohio and her sister states and that no reciprocal agreements have been entered into between Ohio and Michigan under the above noted provisions of the highway use tax law.

"The Tax Commissioner further finds that the highway use tax law makes no provision for authorizing refunds except as provided in section 6 of the act (Section 5728.06 of the Revised Code) which section authorizes refunds on taxes paid for axles not actually used. There is no provision in the act which authorizes refunds on tax alleged to have been erroneously paid."

An appeal was prosecuted to the Board of Tax Appeals and that body affirmed the order of the Tax Commissioner, two of its members writing concurring opinions and one a dissenting opinion.

Case No. 34407 is the appeal of Geo. F. Alger Company and six other nonresident corporations from the Board of Tax Appeals, growing out of 10 separate final orders of the Tax Commissioner in which that officer refused to grant their petition for reassessment of highway use taxes.

It was stipulated that the appellant companies are nonresident motor carriers engaged in the business of transporting freight for hire in interstate commerce under certificates of public convenience and necessity issued to them by the Interstate Commerce Commission, and that such companies have registered the certificates with the Public Utilities Commission of Ohio and have been granted and hold authority to conduct motor carrier operations in interstate commerce over the public highways of Ohio.

The assessments, which are the subject of this appeal, were made by the Tax Commissioner for the first two quarter periods under the Highway Use Tax Act and cover the period from October 1, 1953, to March 31, 1954. Each assessment order provides that no penalty shall be added to the basic assessment if the assessment is paid within 30 days after final determination by the Board of Tax Appeals or the Supreme Court. Otherwise a 15 per cent penalty is to apply to the basic assessment.

An appeal was prosecuted from the assessment made by the Tax Commissioner to the Board of Tax Appeals by each of the appellant companies. Although each of the appeals was separately docketed, the ten cases were consolidated by the Board of Tax Appeals for hearing because the same questions were raised in each appeal.

In the appeal by the Geo. F. Alger Company the claim was made that the assessment of the Tax Commissioner imposed a tax which is illegal, excessive, discriminatory and in violation of constitutional guaranties.

The Board of Tax Appeals affirmed the orders of the Tax Commissioner, reciting with approval in its entry the following finding of the Tax Commissioner:

"The Tax Commissioner finds it unnecessary to ascertain the validity or the existence of the alleged agreement between said states since by the provisions of Section 15 of the Ohio Highway Use Tax Act (Amended Substitute House Bill No. 619, Section 5728.15 of the Revised Code), the Legislature has provided the manner in which reciprocal agreements relating to the highway use tax law may be effected. The Tax Commissioner finds that said section is controlling over any existing reciprocal agreements that may be in effect between Ohio and her sister states and that no reciprocal agreements have been entered into between Ohio and Michigan under the above noted provisions of the highway use tax law.

"As to the constitutional question raised by the petitioner, the Tax Commissioner finds that he is without jurisdiction to set aside acts of the Legislature on the grounds that they are unconstitutional."

One member of the Board of Tax Appeals wrote an opinion, concurred in by a second member, and the third member wrote a dissenting opinion.

The seven companies involved perfected an appeal to this court from the decision of the Board of Tax Appeals, assigning as error both the question as to the existence of a reciprocity agreement raised in the Interstate Motor Freight System appeal and the claims that the Highway Use Tax Act is unconstitutional.

Messrs. Calland, Stouffer & Asher and *Messrs. Warner, Norcross & Judd,* for appellant in case No. 34218.

Messrs. Matheson, Dixon & Brady, Mr. Taylor C. Burneson and *Mr. Thomas F. Chawke,* for appellants in case No. 34407.

Mr. C. William O'Neill, attorney general, *Mr. Joseph S. Gill* and *Mr. W. E. Herron,* for appellee.

HART, J. These are appeals from decisions of the Board of Tax Appeals affirming orders of the Tax Commissioner assessing highway use taxes against motor carriers of Michigan operating in Ohio.

The appellants attack the assessments made against them pursuant to the provisions of the Highway Use Tax Act (Sections 5728.01 to 5728.15, inclusive, Revised Code), and the decisions of the Board of Tax Appeals validating such tax, on the claimed ground that the tax is illegal, excessive, discriminatory and in violation of constitutional guaranties. Specifically, the appellants, among other things, variously claim:

That there is presently in force and effect a reciprocity agreement between the state of Ohio and the state of Michigan, under date of October 26, 1937, which provides that motor vehicles, trailers, or semitrailers owned and registered elsewhere and engaged in commercial transportation shall be operated in the state of Ohio without the payment of any highway use tax.

That the assessments by the Tax Commissioner and the collection of the taxes imposed thereby impair the obligation of the reciprocal agreements, hereinbefore referred to, between the state of Ohio and other states, in violation of Section 10 of Article I of the Constitution of the United States and Section 28 of Article II of the Constitution of Ohio.

That the Board of Tax Appeals erred in finding that the Tax Commissioner's jurisdiction and authority to refund highway use taxes is limited to the provisions of Section 5728.06, Revised Code.

Effective June 30, 1933, Section 6306-1, General Code, provided in part:

"The Attorney General, the Director of Highways and a member of the Public Utilities Commission, designated by the commission for that purpose, are hereby authorized and empowered to enter into such reciprocal contracts and agreements as they may deem proper or expedient with the proper authorities of adjoining states, regulating the use, on the roads and highways of this state, of trucks and automobiles and any other motor vehicles owned in such adjoining states, and duly licensed under the law thereof."

Pursuant to Act 185 of Michigan Public Acts of 1937, and pursuant to Sections 614-94, 614-112, 6306 and 6306-1, General Code, a reciprocity agreement with respect to the operation of motor carriers operating between the two states was entered into through their proper officers, Ohio being represented by the Attorney General, Director of Highways and a designated member of the Public Utilities Commission, such officials being hereinafter called the reciprocity board, as authorized by Section 6306-1, General Code, as of October 26, 1937, which agreement provides, among other things:

"In order to facilitate motor vehicle movements in interstate commerce between and through their combined geographical territories, the state of Ohio, with respect to the interstate commerce operations of Michigan motor carriers within Ohio territorial limits • • • agree that when such outstate carriers have secured reciprocity ex-

emption cards or plates * * * then they, the said states, shall to the extent of granted exemptions, severally waive and forego * * * payment by their respective outstate motor carriers of the license plate taxes, including *weight taxes* for motor vehicles, and also *mileage fees* for their operations, including Ohio taxes levied under the provisions of Sections 614-94, 614-112, 6291, 6292 and 6293, and any connected provisions of the Ohio General Code, or which may be levied or payable in lieu of such provisions * * *." (Italics supplied.)

By the terms of the agreement it is to continue until December 31, 1937, and "thereafter until this * * * agreement shall be * * * terminated by either on written notice first to be given to the other, of intent to terminate." It is agreed by the parties that the agreement is still in force and effect between the two states. In fact, it is the only agreement by which the two states recognize each other's license plates up to the present time. Incidentally, it is conceded that the Michigan carriers involved in the instant cases are licensed by and have complied with the motor vehicle laws of the state of Michigan and no question is raised that the two states in question have the power to enter into such reciprocity agreements. It is also conceded that since the execution of the reciprocity agreement above referred to, Michigan residents operating motor vehicles in their own state have paid a third structure tax, to wit, mileage fees along with their license fees *but Michigan has not imposed this tax on Ohio owners of motor vehicles operating them in the state of Michigan.*

Section 5728.06, Revised Code, which levies the tax in question, provides:

"For the purpose of providing revenues to pay * * * the state's share of the cost of constructing or reconstructing highways and eliminating railway grade crossings on

the major thoroughfares of the state highway system * * * there is hereby levied a highway use tax upon each commercial car with three or more axles, each commercial car used as part of a commercial tandem and each commercial tractor used as part of a commercial tractor combination or commercial tandem at the following rates, to wit: (1) one-half cent for each mile traveled in Ohio by each commercial car with three or more axles * * *; (2) one cent for each mile traveled in Ohio by a commercial tractor * * * with a maximum of three axles; (3) one and one-half cents for each mile traveled in Ohio by a commercial tractor * * * with a maximum of four axles; (4) two cents for each mile traveled in Ohio by a commercial tractor * * * with a total of five or more axles; (5) two and one-half cents for each mile traveled in Ohio by each commercial car or commercial tractor * * * as part of a commercial tandem with four or more axles."

The controversy before the court is whether the 1937 reciprocity agreement between Ohio and Michigan exempts Michigan commercial carriers operating in Ohio from the highway use tax. The appellants contend that such tax can not be the basis of valid assessments against them because they are protected by the exemption provided by the reciprocity agreement between Ohio and Michigan.

The Tax Commissioner took the position that it was unnecessary to determine the validity of the 1937 reciprocity agreement between Ohio and Michigan, since by the provisions of Section 5728.15, Revised Code, the Ohio General Assembly has provided an exclusive method by which reciprocity agreements relating to this type of tax may be effected and by which tax refunds may be made and that such statute supersedes any existing reciprocity agreements on the subject which may be in effect between Ohio and sister states.

In case No. 34218, Chairman Kirwin of the Board of Tax Appeals, after reciting in his opinion the facts leading up to the Tax Commissioner's refusal to refund the taxes demanded by appellant, said:

"Appellant's contention that the Tax Commissioner's refusal to rule that the October 26, 1937, reciprocity agreement exempted its Michigan licensed and certificated motor carriers from the highway use tax tends to impair the obligation of contracts, constitutes a denial of due process of law, and otherwise violates the Constitution of the United States is without merit. Such constitutional questions were not properly before the Tax Commissioner for determination, nor are they properly before us for determination. If the Tax Commissioner lacks jurisdiction and authority to issue the refund order requested by appellant he would be engaging in idle speculation if he attempted to decide such constitutional questions.

"In this connection it might be observed that the Tax Commissioner as a tax administrator and the Board of Tax Appeals as an administrative and quasi-judicial tribunal will not assume jurisdiction and authority to consider and determine such constitutional questions, even if seasonably raised by appellant. See *National Distillers Products Corp. v. Glander,* 49 Ohio Law Abs., 330, 337; *Hillsborough Township v. Cromwell,* 326 U. S., 620, 625, 90 L. Ed., 358, 364; *Schwartz v. Essex County Board of Taxation,* 120 N. J. L., 129, 132, affirmed 130 N. J. L., 177.

• • •

"Appellant's contention that the provisions of the Revised Code Section 5728.15 make it mandatory that the Ohio Attorney General, Ohio Tax Commissioner and the designated member of the Public Utilities Commission of Ohio enter into a reciprocity agreement with the Re-

ciprocity Board of the state of Michigan surely can not be resolved by the Tax Commissioner or the Board of Tax Appeals. If there has been any failure of the Ohio reciprocity board [to] perform an act made mandatory by statute the remedy of appellant is by way of a mandamus action in a court of competent jurisdiction."

Vice-Chairman Sherick of the Board of Tax Appeals in a concurring opinion said:

"The issue presented in this cause, as I see it, rests squarely upon one point. All other collateral matters are but incidental thereto and embodied therein. The question is: Does the Ohio highway use tax of 1953, as construed and applied by the Tax Commissioner, impair the obligation of the reciprocity agreement of 1937 still existing between the state of Ohio and the state of Michigan?

"* * *

"Appellant contends that 'the interpretation which the Attorney General requests this board to adopt would be unconstitutional in that it would amount to the taking of property without due process of law.' Whether this act abridges and limits the jurisdiction of the Tax Commissioner theretofore conferred by General Code Section 1464-3 (now Revised Code Section 5703.05), whether the terms of the reciprocity agreement embrace therein the kind of tax imposed by the act, whether the reciprocity commission created by the act has acted or not, are all questions going to the matter of legality or illegality of the tax imposed, which is sought to be recovered by the appellant, all of which are embodied in the principal issue.

"Since the issue presents a constitutional question, and this board has no jurisdiction in such matters, the order complained of should be affirmed, and the way opened for an appeal to a tribunal possessed of such jurisdiction.

For the reason noted the order appealed from should be affirmed."

Member Pickens of the Board of Tax Appeals dissented and, in an opinion, said:

"The facts are clear that with proper authority the state of Michigan and the state of Ohio entered into a valid reciprocal agreement on October 26, 1937 * * *.

"The Attorney General, representing the Tax Commissioner, the appellee herein, had this to say in his brief:

"'* * * the agreement of 1937 between Michigan and Ohio has no effect on reciprocity as to highway use taxes and since there have been no agreements executed under statutory reciprocity authorized in the Highway Use Tax Act, the appellant's claim that it is entitled to reciprocity of highway use taxes is without merit.'

"I cannot agree with this contention. The fact that a different reciprocity board is authorized by Section 5728.-15, Revised Code, to extend reciprocity to adjoining states as it relates to highway use tax does not invalidate agreements made by a reciprocity board authorized under G. C. Section 6306-1 (R. C. 4503.37). If it was the intention and desire to invalidate and nullify the reciprocity agreement entered into on October 26, 1937, between Michigan and Ohio, this should have been accomplished by the terms and conditions of that agreement. I find no evidence to the effect that the agreement of October 26, 1937, was ever invalidated, nullified, cancelled or terminated and therefore, in my opinion, it is and was in full force and effect.

"This raises the question then as to whether or not the reciprocity agreement of October 26, 1937, embraces the

tax imposed by Section 5728.06, R. C. To answer this question, the agreement itself must be consulted. * * *

"* * *

"In my opinion, the language 'severally waive and forego, and do hereby so waive and forego payment by their respective outstate motor carriers of the license plate taxes, including weight taxes for motor vehicles, and also mileage fees for their operations' is adequate and sufficient to include the tax imposed by the highway use tax. * * *

"This being true, it follows that the Tax Commissioner was without authority to collect the taxes imposed on the Interstate Motor Freight System of Michigan of which complaint is made."

It is apparent from the foregoing that neither the Tax Commissioner nor the majority of the Board of Tax Appeals passed upon the validity or applicability of the reciprocity agreement of October 26, 1937, as affecting the power of the Tax Commissioner to assess and collect the taxes in question. The Tax Commissioner took the position that he had no authority to make any refund and the Board of Tax Appeals affirmed on the theory that since the controversy involved constitutional questions it had no jurisdiction to decide the question on the merits.

The Attorney General representing the appellee, Tax Commissioner, asserts with reference to the reciprocity agreement of 1937 that the Ohio highway use tax was not in existence in 1937, that, therefore, there could be no valid agreed exemption as to it, and that only license-plate taxes are involved in that agreement. He also maintains that reciprocity agreements can apply only to existing reciprocity legislation.

It is significant, however, that in the 1937 agreement Ohio specifically waives mileage fees for operation of motor vehicles, even though at the date of the agreement no such mileage fee or tax had been levied by the state of Ohio. A very possible reason for such conceded exemption of a possible future tax could be the fact that the state of Michigan already had in effect a mileage tax from which Ohio carriers are by the agreement exempted.

The Attorney General maintains that the agreement of 1937 could not survive subsequent legislation which changed the situation and made it inapplicable. But it is to be noted that the new Ohio Highway Use Tax Act (Sections 5728.01 to 5728.15, inclusive, Revised Code) not only does not amend or repeal Sections 6306 and 6306-1, General Code, now Sections 4503.36 and 4503.37, Revised Code, but in Section 5728.15 provides that designated Ohio state officers "are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state * * * which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions * * * of this act the owner of every motor vehicle which is duly registered in any such state * * * provided such owner has complied with the laws of the state * * * of his residence pertaining to the registration and taxation of motor vehicles and complies with such laws while operating and driving such motor vehicle upon the public roads or highways of this state, and provided further, that the owners and operators of motor vehicles registered in this state shall be exempt from all obligations pertaining to the registration and taxation of motor vehicles in such other state."

It will be seen that the new act is not in conflict with the provisions of the reciprocity agreement of 1937 or with Sections 6306 and 6306-1, General Code, which authorized

it, but, in fact, the new act carries the same or greater power to make such reciprocity agreements.

In case No. 34407, the Tax Commissioner argues that under Section 6306-1, General Code, the reciprocity board created by the provisions of such section in 1935 was authorized by the General Assembly to enter into reciprocity agreements pertaining only to license taxes referred to in Sections 6290 to 6310-37, General Code, under the title of "Motor Vehicles," and that the waiver authorized by Section 6306-1, General Code, related to them only as referred to in Section 6306, General Code. However, Section 6306-1, General Code, was originally enacted in 1925 (111 Ohio Laws, 233) as an independent section and was in no way associated with Section 6306, General Code. Four years later, in 1929, Section 6306 was amended (113 Ohio Laws, 475) so as to give agreement jurisdiction to the reciprocity board already established under Section 6306-1, General Code. As a result the reciprocity board had no function to perform with respect to motor vehicle registration fees until four years after the creation of the board by Section 6306-1, General Code.

The reciprocity agreement of 1937 clearly includes a waiver and exemption of "*weight taxes for motor vehicles, and also mileage fees for their operations*" in favor of Michigan's commercial motor vehicles operating in Ohio. It is also clear that *the Ohio highway use tax is a mileage tax.* The rate of tax is fixed by the character and capacity of the commercial carrier vehicles, taking into consideration the number of axles used as a determining factor, but *the tax is computed according to the operation mileage.*

To date, Ohio has not seen fit to secure a concellation of its 1937 reciprocal agreement by mere notice of such cancellation. The fact is that Ohio is operating under

that agreement so far as Michigan license taxes and Michigan mileage taxes are concerned. So long as it keeps that agreement in force it is not in position to impose the tax on commercial motor carriers operating out of Michigan in interstate commerce.

Having determined that the 1937 reciprocity agreement between the states of Ohio and Michigan is in force and effect, it will not be necessary to pass upon the constitutional questions raised by the appellants. It is a well established rule of law that where a case can be determined upon any other theory than that of the constitutionality of a challenged statute, no consideration will be given to the constitutional question. *State, ex rel. Lieux, v. Village of Westlake,* 154 Ohio St. 412, 96 N. E. (2d), 414; *Village of Strongsville v. McPhee,* 142 Ohio St., 534, 53 N. E. (2d), 522; *State, ex rel. Herbert, v. Ferguson, Aud.,* 142 Ohio St., 496, 52 N. E. (2d), 980; *Wiggins v. Babbitt,* 130 Ohio St., 240, 198 N. E., 873; *Rucker v. State,* 119 Ohio St., 189, 162 N. E., 802; *American Cancer Society, Inc., v. City of Dayton,* 160 Ohio St., 114, 114 N. E. (2d), 219.

Finally, the Tax Commissioner claims that he has no power or authority to refund taxes paid by the appellants; that the only authority for the refund of highway use taxes is contained in Section 5728.06, Revised Code, which provides that in the event the owner of a commercial car or commercial tractor, "at the end of any calendar year, has paid a tax for axles not actually used in operation over a given number of miles he may file with the Tax Commissioner an application for a refund of the excess taxes paid"; and that the statute just referred to permits recovery of taxes paid only on axles not used in operation and does not extend to axle miles traveled in Ohio.

Under Section 5717.03, Revised Code, the Board of Tax Appeals is given jurisdiction and authority to affirm, reverse, vacate or modify the tax assessments, valuations, determinations, findings, computations or orders of the Tax Commissioner complained of, where appeals therefrom are perfected to the board within the period prescribed by statute. It would be utter futility to perfect such an appeal if, after the Board of Tax Appeals reversed the action of the Tax Commissioner as to taxes illegally collected, there was no remedy by which a refund could be required.

Section 5703.05, Revised Code, provides the remedy. It defines the powers, duties and functions of the Tax Commissioner, and the pertinent part of the section provides as follows:

"All other powers, duties, and functions of the Department of Taxation, except those mentioned in Sections 5703.02 and 5703.04 of the Revised Code, are vested in and shall be performed by the Tax Commissioner, which powers, duties, and functions shall include, but shall not be limited to the following:

"• • •

"(B) Exercising the authority provided by law relative to remitting or refunding taxes or assessments • • • illegally or erroneously assessed or collected, or for any other reason overpaid, except as provided in division (I) of Section 5703.02 of the Revised Code, and in addition, the commissioner has the authority on written application of any person, firm, or corporation claiming to have overpaid to the Treasurer of State at any time within five years prior to the making of such application any tax payable under any law which the Department of Taxation is required to administer, or on his own motion investigate the facts and make in triplicate a written statement of his

findings, and * * * issue in triplicate a certificate of abatement payable to the taxpayer, his assigns, or legal representative which shows the amount of the overpayment and the kind of tax overpaid."

The decisions of the Board of Tax Appeals are reversed, and the Tax Commissioner is ordered, in accordance herewith, to make refunds of taxes erroneously paid.

Decisions reversed.

WEYGANDT, C. J., MATTHIAS and STEWART, JJ., concur.

ZIMMERMAN, BELL and TAFT, JJ., dissent.

TAFT, J., dissenting. By the words of the 1937 reciprocity agreement, Ohio and Michigan did each "severally waive and forego * * * payment by their respective outstate motor carriers of the license plate taxes, including weight taxes for motor vehicles, and also mileage fees for their operations, including Ohio taxes levied under the provisions of Sections 614-94, 614-112, 6291, 6292 and 6293, and any connected provisions of the Ohio General Code, or which may be levied or payable in lieu of such provisions, also including Michigan mileage fees under or in lieu of Section (2) of Article IV of Act 254 of the Michigan Public Acts of 1933, as amended, and weight taxes under Act 302 of the Michigan Public Acts of 1915, as amended, but excluding in all cases the filing fees, if any, to either commission for filing and hearing of application for procurement of carriers operating authority, or permits for such; which said taxes and fees included within this waiver provision are sometimes herein described as exempted taxes and fees."

The words "license plate taxes, including weight taxes for motor vehicles, and also mileage fees for their opera-

tions" are general words. Standing alone, these words (especially in view of the portion, "including • • • mileage *fees* for their operations") might be broad enough to cover the Ohio axle-mile *tax*. However, these general words do not stand alone in the 1937 reciprocity agreement but are followed therein by references to "taxes" levied under specified Ohio statutes which are intended to be included and by references to "fees" *and* "taxes" under specified Michigan statutes. The tax involved in the instant cases is admittedly not "levied under the provisions of" any of the sections of the Ohio statutes specified in the 1937 reciprocity agreement or "any connected provisions of the Ohio General Code"; and the tax involved in the instant cases is also obviously not one "levied or payable in lieu of" any taxes or fees provided for in the Ohio statutory provisions specified in that 1937 reciprocity agreement. It may be observed also that, with regard to Ohio, reference is made only to "taxes," although, with regard to Michigan, reference is made to "fees" and "taxes," and the reference generally to "mileage fees" is not one to mileage taxes.

It may further be observed that the claim of appellants in the instant cases is for an interpretation of the 1937 reciprocity agreement which will provide them with an exemption from taxation. Although statutory provisions claimed to provide for exemption from taxation are to be reasonably construed, they are strictly construed against those claiming such tax exemption. *In re Bond Hill-Roselawn Hebrew School,* 151 Ohio St., 70, 84 N. E. (2d), 270. In my opinion, the same rule of construction should apply with respect to interpretation of this contract, since it is claimed that those acting on behalf of the state in making the contract have provided therein for exemption from taxation.

In my opinion, the 1937 reciprocity agreement between Ohio and Michigan can not reasonably be interpreted to cover the axle-mile tax, levied for the first time in 1953 as a consequence of the enactment of Sections 5728.01 to 5728.15, inclusive, Revised Code.

ZIMMERMAN and BELL, JJ., concur in the foregoing dissenting opinion.

APPENDIX A (Continued)

(3) Decision of Ohio Board of Tax Appeals in Case No. 30565 Before the Supreme Court of Ohio and Final Order of Tax Commission of Ohio Incorporated Therein.

(No. 30565)

BEFORE THE BOARD OF TAX APPEALS

DEPARTMENT OF TAXATION

STATE OF OHIO

Geo. F. Alger Company, 3050 Lonyo Road, Detroit, Michigan, *Appellant,* v. Stanley J. Bowers, Tax Commissioner of Ohio, *Appellee.*	Case No. 30565 (Highway Use Tax) ENTRY

Appearances: For the Appellant: Edmund M. Brady and John Veale, c/o Matheson, Dixon & Brady, Guardian Building, Detroit, Michigan, and Taylor C. Burneson, 3510 LeVeque-Lincoln Tower, Columbus, Ohio; For the Appellee: C. William O'Neill, Attorney General of Ohio, by W. E. Herron, Assistant.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of March 7, 1956, by the appellant above named from a final highway use tax assessment order made against it by the Tax Commissioner under date of February 7, 1956, for the audit period April 1, 1954, to June 30, 1954, in the basic amount of $5,881.70 with a 15% penalty

thereon contingent upon date of final payment of the assessment as set out by the terms of said final order.

The cause was submitted to the Board of Tax Appeals on the notice of appeal, the transcript of the proceedings of the Tax Commissioner, a stipulation of facts agreed to by the parties, and the testimony and evidence presented at a hearing before the Board of Tax Appeals on April 11, 1956.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Notice is hereby given to the Board of Tax Appeals and to the Tax Commissioner that appellant, Geo. F. Alger Company, hereby takes an appeal to the Board of Tax Appeals from the final determination, order and highway use tax assessment made against it by the Tax Commissioner, Serial No. A 21309, dated February 7, 1956, for the period from April 1, 1954 to June 30, 1954, a true copy of which is attached hereto and incorporated herein by reference.
>
> "This appeal is taken pursuant to Section 5717.02 of the Revised Code of Ohio.
>
> "Appellant is, and was during the aforesaid assessment period, a corporation organized and existing under the laws of the State of Michigan, and it has, and then had, its principal place of business at 3050 Lonyo Road, Detroit, Michigan.
>
> "Appellant is, and was during the aforesaid assessment period, a 'common carrier by motor vehicle' and a 'motor carrier' as defined in Part II of the Interstate Commerce Act (U. S. C., Title 49, Section 301 et seq.), and, as such, it operates, and then operated, upon and over the public highways located in the State of Ohio and certain other states, but primarily upon and over federal-aid highways, in interstate and foreign commerce, by authority of

certificates issued to it by the Interstate Commerce Commission. Such authority has been duly registered with the Public Utilities Commission of Ohio.

"By this notice of appeal, appellant complains and alleges that the aforesaid determination, order and assessment of the Tax Commissioner is erroneous, unreasonable, unlawful and unconstitutional for the following reasons:

I

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, under which said determination, order and assessment was made, are invalid and unconstitutional because (a) the tax imposed thereby is excessive and bears no reasonable relationship to use of, or the state's portion of the cost of construction, maintenance and operation of, public highways located within the state, particularly the federal-aid highways used by appellant and others similarly situated in the conduct of their federally-authorized operations in interstate and foreign commerce, and (b) the tax imposed thereby is based upon an unreasonable, arbitrary, discriminatory and invidious classification or taxing formula.

II

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code, as applied by the Tax Commissioner, are invalid and unconstitutional because (a) said sections impose a direct, undue and destructive burden upon interstate and foreign commerce, (b) said sections operate to destroy or impair the transportation business in which appellant and other federally-authorized and similarly-situated motor carriers are engaged into, through and out of the State of Ohio, by imposing upon such business multiple state taxation, thereby disrupting the free flow of commerce among the

states of the nation, and (c), through the medium of excessive and multiple state taxation, said sections operate to regulate the transportation of freight in interstate and foreign commerce, thereby unlawfully interfering with the exclusive power of regulation of [redacted] commerce which the Congress of the United States has conferred upon and vested in the Interstate Commerce Commission through the enactment of Part II of the Interstate Commerce Act, (U. S. C., Title 49, Section 301 et seq.).

III

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, and the aforesaid determination, order and assessment of the Tax Commissioner which was made thereunder, are invalid and unconstitutional because (a) they operate to deprive appellant of its property without due process of law and (b) they operate to deprive appellant of the equal protection of the laws.

"For said reasons, appellant contends and alleges that Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, and the aforesaid determination, order and assessment of the Tax Commissioner which was made thereunder, are in contravention of Article I, Section 8, of the Constitution of the United States, Amendments V and XIV of the Constitution of the United States, Article I, Sections 1 and 16, of the Constitution of the State of Ohio, and Article XII, Section 5, of the Constitution of the State of Ohio.

"Wherefore, appellant prays (a) for a determination by the Board of Tax Appeals of the issues herein raised, (b) for a finding by the Board of Tax Appeals that the aforesaid determination, order and tax assessment of the Tax Commissioner, dated February 7, 1956, was erroneously and unlawfully made,

and (c) for an order of the Board of Tax Appeals setting aside said determination, order and assessment."

The final order of the Tax Commissioner from which the appeal was perfected reads as follows:

"Petitioner makes numerous objections to the assessment, which may be classified generally as follows: (1) That this assessment which was made in accordance with the provisions of Section 5728.01 to 5728.14, inclusive, of the Ohio Revised Code, is in violation of the Constitution of the State of Ohio and in violation of the Constitution of the United States, (2) That Section 5728.15, Revised Code, imposes a mandatory duty upon the officials named therein to enter reciprocal contracts and agreements with the other States of the Nation as in said section provided for, and (3) that the assessment is in violation of the reciprocity agreement between Ohio and Michigan which was in force and effect during the period covered by this assessment. An analysis of mileage applicable to various vehicles operated by and for the petitioner, which shows the State in which said vehicles were owned and licensed was also submitted.

"Now, therefore, being fully advised in the premises and after consideration of the information submitted by the petitioner and of information furnished from the records of the Division of Sales and Highway Use Taxes the Tax Commissioner finds:

"That he has no jurisdiction to consider the constitutional issues presented;

"That it is not necessary to rule upon petitioner's allegation that Section 5728.15, Revised Code, imposes a mandatory duty to enter reciprocity agreements as in said section provided for in view of the finding in the paragraph next following which recognizes the Ohio-Michigan reciprocity agreement,

which was in effect during the period covered by this assessment, which agreement being the only agreement which petitioner urges as being applicable to the issues herein;

"That in the original assessment of $29,688.92 plus penalty $4,453.34, total $34,142.26, the amount of $23,807.22, plus penalty of $3,571.09, total $27,378.31 was assessed upon the operation of vehicles which were exempted from the application of the Ohio Highway Use Tax under the provisions of the Ohio-Michigan Reciprocity Agreement, which was in full force and effect during the period covered by this assessment. Said portion of the assessment was therefore erroneous and it is therefore ordered that said portion be, and the same is, hereby canceled and that the assessment stand as so adjusted.

"The penalty is conditionally remitted.

"Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(HUT)	$5,881.70	None	$5,881.70

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

"If the total amount is not paid as above provided, the assessment shall stand as adjusted in the following amount:

	Assessment	Penalty	Total
(HUT)	$5,881.70	$882.25	$6,763.95"

The notice of appeal in this case complains that Ohio Revised Code Sections 5728.01 to 5728.14, inclusive, under the provisions of which sections the Tax Commissioner made the complained of assessement, are invalid and unconstitutional as applied to appellant for the reasons stated in said notice of appeal; and that because the final order of the Tax Commissioner was predicated upon the validity of said sections of the statutes, then the final order itself is erroneous and unlawful.

No complaint is made that the final order is erroneous because of any specified error committed by the Tax Commissioner in making the assessment (*Queen City Valves, Inc. v. Peck,* 161 Ohio State Reports 579). Thus, the only issue presented to the Board of Tax Appeals by said notice of appeal is a question as to the constitutionality of Ohio Revised Code Sections 5728.01 to 5728.04, inclusive.

The Board of Tax Appeals, being a quasi-judicial body, must and does consider all sections of the Ohio Revised Code to be constitutional enactments. In this connection see *National Distillers Products Corp. v. Glander,* 49 Abs. 330, 337; *Hillsborough Township v. Cromwell,* 326 U. S. 620, 625, 90 L. Ed. 358, 364; *Schwartz v. Essex County Board of Taxation,* 120 N. J. L. 129, 132, affirmed 130 N. J. L. 177. In the last noted case it was said:

> "It is undisputable that the determination of the constitutionality of an act of this legislature rests with a judicial body; not with a quasi-judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified body."

Upon the foregoing considerations and finding no error on the part of the Tax Commissioner in making the complained of assessment, it is considered and ordered that the final order of the Tax Commissioner be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Patricia McBride,
Secretary.

APPENDIX A (Continued)

(4) Decision of Ohio Board of Tax Appeals in Case No. 35067 Before the Supreme Court of Ohio on Final Order of Tax Commission of Ohio Incorporated Therein.

(No. 32604)

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

Geo. F. Alger Company, Detroit, Michigan, *Appellant,* v. Stanley J. Bowers, Tax Commissioner of Ohio, *Appellee.*	Case No. 32604 (Highway Use Tax) ENTRY

Appearances: For the Appellant—Edmund M. Brady, c/o Matheson, Dixon and Brady, 2150 Guardian Building, Detroit, Michigan and Taylor C. Burneson, 3510 LeVeque Lincoln Tower, Columbus, Ohio; For the Appellee—C. Wm. O'Neill, Attorney General of Ohio, by William E. Herron, Assistant.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of August 17, 1956 by the appellant above named from a final highway use tax assessment order made against it by the Tax Commissioner under date of July 23, 1956 for the audit period October 1, 1955 to December 31, 1955 in the basic amount of $30,122.75 with a penalty thereon contingent upon date of final payment of the assessment as set out by the terms of said final order.

The cause was submitted to the Board of Tax Appeals on the notice of appeal, the transcript of the proceedings of the Tax Commissioner, the stipulations, testimony and evidence presented at a hearing before the Board of Tax Appeals in Columbus, Ohio on September 12, 1956 and the briefs supplied by counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

> "Notice is hereby given to the Board of Tax Appeals and to the Tax Commissioner that appellant, Geo. F. Alger Company, hereby takes an appeal to the Board of Tax Appeals from the final determination, order and highway use tax assessment made against it by the Tax Commissioner, Serial No. C. 20665, dated July 23, 1956, for the period from October 1, 1955 to December 31, 1955, a true copy of which is attached hereto and incorporated herein by reference.
>
> "This appeal is taken pursuant to Section 5717.02 of the Revised Code of Ohio.
>
> "Appellant is, and was during the aforesaid period, a corporation organized and existing under the laws of the State of Michigan, and it now has, and then had, its principal place of business at 3050 Lonyo Road, Detroit, Michigan.
>
> "Appellant is, and was during the aforesaid period, a 'common carrier by motor vehicle' and a 'motor carrier' as defined in Part II of the Interstate Commerce Act (U. S. C., Title 49, Section 301 et seq.), and, as such, it now operates, and then operated, upon and over the public highways of the State of Ohio and certain other states, primarily federal-aid highways, exclusively in interstate and foreign commerce, by authority of certificates issued to it by the Interstate Commerce Commission, which authority is now, and was during the aforesaid period, duly registered with the Public Utilities Commission of Ohio.

"By this notice of appeal, appellant complains and alleges that the aforesaid determination, order and assessment of the Tax Commissioner is erroneous, unreasonable, unlawful, unconstitutional and void for the following reasons:

I

"The Tax Commissioner erred in finding (a) that the reciprocity agreement between the State of Ohio and the State of Michigan, entered into on October 26, 1937, had been cancelled as of September 24, 1955, (b) that the reciprocity agreement between the State of Ohio and the State of Indiana, entered into on December 23, 1937 and amended on March 30, 1944, had been cancelled as of October 9, 1955, and (c) that, consequently, the making of the aforesaid assessment against appellant was not in contravention of either of said agreements.

II

"The Tax Commissioner, in finding that the aforesaid agreements had been cancelled, erroneously considered and relied upon certain notices of cancellation, dated August 9, 1955, which were sent to the States of Michigan and Indiana by, and in the name of, certain officials of the State of Ohio who acted arbitrarily, capriciously, without statutory authority, and with the avowed and unlawful purpose of destroying the reciprocity which they were commanded by the General Assembly of the State of Ohio to effectuate and preserve.

III

"The Tax Commissioner erred in not finding (a) that the aforesaid notices of cancellation were nullities and of no legal significance or effect under the statutes of the State of Ohio, (b) that the aforesaid reciprocity agreements were in full

force and effect during the period from October 1, 1955 to December 31, 1955, and (c) that appellant, by reason of said agreements, was not required to pay the Ohio highway use tax during said period for the use and operation of such vehicles as were licensed in the State of Michigan or in the State of Indiana.

IV

The Tax Commissioner erred in making his aforesaid assessment against appellant because, in so doing, he acted to impair the obligations of the aforesaid reciprocity agreements, in contravention of Article I, Section 10, of the Constitution of the United States, and Article II, Section 28, of the Constitution of the State of Ohio.

V

"The Tax Commissioner erred in making said determination, order and assessment because, in so doing, he knowingly ignored the mandatory provisions of Section 5728.15 of the Revised Code of Ohio, by which the General Assembly, through the means of reciprocity agreements, and in pursuance of the established reciprocity policy of the state, intended to exempt, and did exempt, appellant and other out-of-state motor carriers similarly situated from compliance with the provisions of Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio.

VI

"The Tax Commissioner erred in making said determination, order and assessment because, in so doing, he acted in furtherance of his own unlawful failure and the unlawful failure of the other state officials designated in Section 5728.15 of the Revised Code of Ohio to perform the mandatory duty imposed upon him and such other offi-

cials by the provisions of said section, thereby acting pursuant to no law and in contravention of Article XII, Section 5, of the Constitution of the State of Ohio.

VII

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, under which said determination, order and assessment was made, are invalid and unconstitutional because (a) the tax imposed thereby is excessive and bears no reasonable relationship to appellant's use of, or the state's cost of construction, maintenance and operation of, the public highways within the state, particularly the interstate federal-aid highways, used by appellant in the conduct of its federally-authorized operations in interstate and foreign commerce, and (b) the tax imposed thereby is based upon an unreasonable, arbitrary, discriminatory and invidious classification or taxing formula.

VIII

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, as applied by the Tax Commissioner, are invalid and unconstitutional because (a) they impose a direct, undue and destructive burden upon interstate and foreign commerce, (b) they subject the business in which appellant and other federally-authorized and similarly-situated motor carriers are engaged to destructive multiple state taxation, thereby disrupting the free flow of commerce among the states of the nation, and (c), through the medium of excessive taxation, they operate to effectively regulate the transportation of property in interstate and foreign commerce, thereby unlawfully interfering with the exclusive power of regulation of such commerce which the Congress of the United States has conferred upon and vested in the Interstate

Commerce Commission through the enactment of Part II of the Interstate Commerce Act (U. S. C., Title 49, Section 301 et seq.).

IX

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, and the aforesaid determination, order and assessment of the Tax Commissioner which was made thereunder, are invalid and unconstitutional because they operate to deprive appellant of its property without due process of law.

X

"Sections 5728.01 to 5728.14, inclusive, of the Revised Code of Ohio, and the aforesaid determination, order and assessment of the Tax Commissioner which was made thereunder, are, for the reasons hereinbefore stated, in contravention of Article I, Section 8, of the Constitution of the United States, Amendments V and XIV of the Constitution of the United States, and Article I, Sections 1 and 16, of the Constitution of the State of Ohio.

"Wherefore, appellant prays (a) for a determination by the Board of Tax Appeals of the issues herein raised, (b) for a finding by the Board of Tax Appeals that the aforesaid determination, order and assessment of the Tax Commissioner, dated July 23, 1956, was erroneously and unlawfully made, and (c) for an order of the Board of Tax Appeals setting said determination, order and assessment aside."

The final order of the Tax Commissioner, from which the appeal was perfected, reads as follows:

"This matter came on to be heard and the Tax Commissioner hereby finds that:

"Taylor C. Burneson and Carl S. Clark, Attorneys-at-Law, 3510 LeVeque-Lincoln Tower, Columbus 15, Ohio and Edmund M. Brady, Attorney-at-Law, 2150 Guardian Building, Detroit 26, Michigan, appeared for hearing at 68 E. Gay St., Columbus, Ohio on June 27, 1956.

"Petitioner makes numerous objections to the assessment which may be generally classified as follows: (1) That the assessment which was made in accordance with the provisions of Section 5728.01 to 5728.14, inclusive, of the Revised Code is in violation of the Constitution of the State of Ohio and in violation of the Constitution of the United States; (2) That Section 5728.15, Revised Code, imposed a mandatory duty upon the officials named therein to enter reciprocal contracts and agreements with other states of the nation as in said section provided for and (3) That the assessment is in violation of the reciprocity agreement between Ohio and Michigan and between Ohio and Indiana, which was in force and effect during the period covered by this assessment.

"Counsel for the petitioner submitted an analysis of mileage showing highway use tax permit numbers under which the tax was incurred together with name and residence address of the owners and the state in which each vehicle for which such permit issued was licensed. A similar analysis was prepared by the Highway Use Tax Section and both are made a part of the assessment file.

"Now, therefore, being fully advised in the premises and after consideration of the information furnished from the records of the Division of Sales and Highway Use Taxes the Tax Commissioner finds:

"That the reciprocity agreement between Ohio and Michigan, upon which petitioner relies, was cancelled, effective September 24, 1955;

"That the reciprocity agreement between Ohio and Indiana, upon which petitioner relies, was cancelled, effective October 9, 1955;

"That the assessment is for tax incurred by petitioner's operations in this state subsequent to the cancellation of the reciprocity agreements above noted;

"That petitioner is therefore not exempted from the tax assessed by reason of said agreements.

"The Tax Commission further finds that petitioner's allegation that Section 5728.15 of the Revised Code imposes a mandatory duty to enter reciprocal agreements is without merit.

"The Tax Commissioner finds that he has no jurisdiction to consider the constitutional issues presented.

"The penalty is conditionally remitted as noted below.

"Therefore, it is the order of the Tax Commissioner that if payment of

	Assessment	Penalty	Total
(HUT)	$30,122.75	None	$30,122.75

is made within thirty (30) days from date of receipt by the taxpayer of the journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals; to an appropriate Court of Appeals; or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

"If the total amount is not paid as above provided, the assessment shall stand as issued in the following amount:

	Assessment	Penalty	Total
(HUT)	$30,122.75	$4,518.41	$34,641.16"

The notice of appeal raises two questions of law, to wit:

(1) Are Ohio Revised Code Sections 5728.01 to 5728.14, inclusive, unconstitutional?

(2) Were the Ohio-Indiana and Ohio-Michigan reciprocity agreements in existence and in full force and effect during the audit period involved in this appeal?

In so far as the constitutional issue is concerned, we must, and do, assume the position taken this day by this Board in the case of Alger vs. Tax Commissioner, Case No. 30565, and find that we must assume that all statutes are constitutional, unless said statutes have been declared unconstitutional by a court of competent jurisdiction.

As to the second issue we find that there were no uncanceiled Ohio-Michigan or Ohio-Indiana highway use tax reciprocity agreements in existence during the audit period involved in this appeal.

The final order of the Tax Commissioner is therefore affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Patricia McBride,
Acting Secretary.

trs

APPENDIX B

Verbatim Text of Ohio Axle Mile Tax Law as Amended (Title 57, Rev. Code of Ohio Chap. 5728, pp. 274 et seq.; Ohio Code Supplement, pp. 38 et seq.).

CHAPTER 5728: [HIGHWAY USE TAX; GASOLINE TAX]

• • • • •

[Highway Use Tax]

§ 5728.01 [*Definitions.*]

As used in sections 2 through 15 [RC §§ 5728.02 through 5728.15] of this act:

(A) "Motor vehicle" means everything on wheels which is self-propelled, other than by muscular power or power collected from electric trolley wires and other than vehicles or machinery not designed for or employed in general highway transportation, used to transport or propel property over a public highway;

(B) "Commercial car" means any motor vehicle used for transporting property, wholly on its own structure, on a public highway;

(C) "Commercial tractor" means any motor vehicle designed and used to propel or draw a trailer or semi-trailer or both on a public highway without having any provision for carrying loads independently of such trailer or semi-trailer;

(D) "Trailer" means everything on wheels which is not self-propelled, except vehicles or machinery not designed for or employed in general highway transportation and except vehicles whose total weight excluding load is less

than three thousand pounds, used for carrying property wholly on its own structure and for being drawn by a motor vehicle on a public highway, including any such vehicle when formed by or operated as a combination of a semi-trailer and a vehicle of the dolly type such as that commonly known as a trailer dolly, except a house trailer;

(E) "Semi-trailer" means everything on wheels which is not self-propelled, except vehicles or machinery not designed for or employed in general highway transportation and except vehicles whose total weight excluding load is less than three thousand pounds, designed and used for carrying property on a public highway when being propelled or drawn by a commercial tractor when part of its own weight or the weight of its load, or both, rest upon and is carried by a commercial tractor;

(F) "Commercial tandem" means any commercial car and trailer or any commercial tractor, semi-trailer and trailer when fastened together and used as one unit;

(G) "Commercial tractor combination" means any commercial tractor and semi-trailer when fastened together and used as one unit;

(H) "Axle" means two or more load carrying wheels mounted in a single transverse vertical plane;

(I) "Public highway" means any highway, road or street dedicated to public use except a highway under the control and jurisdiction of the Ohio turnpike commission created by the provisions of section 5537.02 of the Revised Code.

§ 5728.02 *Highway use permit and identification device; application; fee.*

Every person who is the owner of a commercial car with three or more axles, a commercial car which is to be operated as part of a commercial tandem or a commercial

tractor which is, or is to be, operated or driven upon a public highway shall cause to be filed with the tax commissioner a written application for a permanent highway use permit on blank forms to be furnished by the commissioner for that purpose. Provided, that persons who are permit holders, as of the effective date of this section, need not make application for a permanent permit until expiration of their current permit.

Each application for a highway use permit for a commercial car or a commercial tractor shall state the number of axles on such commercial car or commercial tractor and such other pertinent information as the tax commissioner reasonably prescribes.

The application shall be accompanied by a fee of two dollars.

Upon receipt of such application and fee the commissioner shall issue, to the person making the application a highway use permit and such identification device or devices as he deems necessary for the proper administration of sections 5728.01 to 5728.99, inclusive, of the Revised Code. The permit and the identification device or devices shall be of such design and contain such information as the commissioner shall deem necessary. Such identification device or devices shall be displayed on the commercial car or commercial tractor for which it was issued at all times in such manner as the commissioner shall prescribe. The highway use permits and the identification device and devices shall not be transferable. In case of the loss of a highway use permit or identification device the commissioner shall issue a duplicate thereof upon payment of a fee of one dollar.

Such highway use permit shall be valid until suspended or surrendered.

All moneys collected pursuant to the provisions of this section shall be deposited in the state treasury in accordance with the provisions of section 5728.08 of the Revised Code.

§ 5728.03 Repealed, Eff 9-30-55.

§ 5728.04 *Unlawful operation; tax commissioner to be notified.*

It shall be unlawful, on and after the effective date of this section for any person to operate a commercial car with three or more axles, a commercial car as part of a commercial tandem or a commercial tractor as part of a commercial tractor combination or commercial tandem on a public highway without a valid highway use permit for such commercial car or commercial tractor.

The judge or magistrate of any court finding any person guilty of unlawfully operating a commercial car or commercial tractor as provided for in this section shall immediately notify the tax commissioner of such violation and shall transmit to the commissioner the name and the permanent address of the owner of the commercial car or commercial tractor operated in violation of this section, the registration number, the state of registration and the certificate of title number of the commercial car or commercial tractor.

§ 5728.05 Repealed, Eff 9-30-55.

§5728.06 *Highway use tax; rates; liability of owner and lessee; refunds.*

For the purpose of providing revenues to pay the cost of administering and enforcing the laws pertaining to the levy and collection of the tax imposed by this section, to defray the expenses of the state highway construction council, to provide funds to pay the state's share of the

cost of constructing or reconstructing highways and eliminating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof and to pay the interest, principal, and charges on bonds issued pursuant to section 5528.01 of the Revised Code, there is hereby levied a highway use tax upon each commercial car with three or more axles, each commercial car used as part of a commercial tandem and each commercial tractor used as part of a commercial tractor combination or commercial tandem at the following rates to-wit:

(A) One-half cent for each mile traveled on a public highway in Ohio by each commercial car with three or more axles;

(B) One cent for each mile traveled on a public highway in Ohio by a commercial tandem with three axles or a commercial tractor operated as part of a commercial tractor combination with three axles;

(C) One and one half cents for each mile traveled on a public highway in Ohio by a commercial tractor operated as a part of a commercial tractor combination with four axles;

(D) Two cents for each mile traveled on a public highway in Ohio by a commercial tractor operated as part of a commercial tractor combination with a total of five or more axles;

(E) Two and one-half cents for each mile traveled on a public highway in Ohio by each commercial car or commercial tractor operated as part of a commercial tandem with four or more axles.

The owner of each commercial car and commercial tractor subject to sections 5728.01 to 5728.17, inclusive, of the Revised Code, shall be liable for the payment of the full

amount of the taxes levied herein, and any person who leases, rents or otherwise acquires a right to use or operate a commercial car or commercial tractor which is subject to sections 5728.01 to 5728.17, inclusive, of the Revised Code, shall be liable for the payment of the taxes levied herein with respect to the miles traveled in operations under such lease, rental or other agreement. The liability of the person leasing, renting or otherwise acquiring a right to use or operate a commercial car or commercial tractor which is subject to sections 5728.01 to 5728.17, inclusive, of the Revised Code, and the liability of the owner of such commercial car or commercial tractor shall be joint and several with respect to the miles traveled in operations under such lease, rental or other agreement. In the event that such owner, at the end of any calendar year, has paid a tax for axles not actually used in operation over a given number of miles he may file with the tax commissioner an application for a refund of the excess taxes paid; provided, that all applications for refunds filed in accordance with this section must be filed within four years from the twentieth day of January of the first calendar year following the effective date of this section. The application shall state the amount of the tax which has been paid by reason of the use of a tax rate determined by the declaration of the maximum number of axles to be used and the tax amount which would have been required if the rate had been determined by the number of axles actually in use for each mile of travel. The owner of the commercial car or commercial tractor shall be entitled to recover the difference between the two amounts stated in the application upon approval by the tax commissioner. The form of the application shall be prescribed by the tax commissioner and it shall be accompanied by a sworn statement as to its truth. The tax commissioner shall order the amount approved for refund to be paid from the rotary fund created in section 5728.08 of the Revised Code.

§5728.061 *Refunds of taxes paid illegally or erroneously.*

The treasurer of state shall refund the amount of taxes paid illegally or erroneously, or paid on any illegal or erroneous assessment. An application shall be filed with the tax commissioner within ninety days from the date it is ascertained that the payment made or assessment paid was illegal or erroneous; provided that in any event such application for refund must be filed with the commissioner within four years from the date of the illegal or erroneous payment of the tax. On filing of such application the commissioner shall determine the amount of refund due and certify such amount to the auditor of state. The commissioner shall order the amount so certified for refund to be paid from the rotary fund created by section 5728.08 of the Revised Code. The auditor of state shall draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. The form of the application for refund shall be prescribed by the tax commissioner and when filed shall be accompanied by a sworn statement as to its truth. Application for refund shall be filed by the person who made payment of the tax for which refund is claimed.

§ 5728.07. *Record of miles traveled.*

Every person who is or becomes liable for the payment of the tax levied in section 5728.06 of the Revised Code shall keep a complete and accurate record, upon forms prescribed by the tax commissioner, showing the total miles traveled on a public highway in this state by each commercial car and commercial tractor owned, leased, rented, or otherwise operated by such person, the number of axles actually used while traveling said miles, the highway use permit number for each commercial car and commercial tractor owned or operated and such other infor-

mation as the tax commissioner may require. Such records shall be available at any time, during normal business hours, for the inspection of the tax commissioner or his duly authorized agents and shall be preserved for a period of four years.

§ 5728.08 *Highway use tax return; liability for payment; rotary fund.*

Whoever is liable for the payment of the tax levied by sections 5728.06 of the Revised Code shall, on or before the twentieth day of each January, April, July, and October after the effective date of this section, file with the treasurer of state, on forms prescribed by the tax commissioner, a highway use tax return and make payment of the full amount of the tax due for the operation of each commercial car and commercial tractor for the next preceding three calendar months. Provided that in the event two or more persons are jointly and severally liable for the payment of the tax on a given number of miles traveled, no person shall be required to pay the tax on said given number of miles traveled if said tax has been paid, or is currently being paid, by another. Nothing herein shall be construed to relieve any person liable for the payment of the tax from the duty of filing returns showing the full amount of tax accrued by reason of the operation of any commercial car or commercial tractor owned, leased, rented, or otherwise operated by him. Nothing in this section shall be construed to limit the power of the commissioner to make assessments in accordance with section 5728.10 of the Revised Code, against any or all person or persons liable in the event said tax is not actually paid or any deficiencies are found to be due.

Immediately upon the receipt of the highway use tax return the treasurer of state shall mark on such return

the date it was received by him and the amount of tax payment accompanying the return and shall transmit such return to the tax commissioner.

Upon the receipt of such taxes the treasurer of state shall deposit the first two hundred fifty thousand dollars collected in a special fund to be known as the highway use tax rotary fund, hereby created, and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of such credit amount to two hundred fifty thousand dollars. The moneys to the credit of the highway use tax rotary fund, when appropriated by the general assembly, shall be used by the tax commissioner to defray expenses incurred by the department of taxation in administering sections 5728.01 to 5728.17, inclusive, of the Revised Code. The emergency board created by section 127.01 of the Revised Code, shall, in addition to the other powers conferred upon it, in the event of any emergency in the administration of sections 5728.01 to 5728.17, inclusive, of the Revised Code, requiring the expenditure of money in connection with the levy and collection of the tax imposed by section 5728.06 of the Revised Code, not specifically provided by law, grant authority to the tax commissioner to make expenditures in the same manner in all respects as required by sections 127.01, 127.02, 127.03 and 127.04 of the Revised Code, except that the warrants of the auditor of state shall be drawn against said highway use tax rotary fund.

The balance of taxes for which the liability has become fixed prior to July 1, 1955, pursuant to this section shall be deposited in the state treasury to the credit of the state highway construction and bond retirement fund created by section 5728.17 of the Revised Code.

The balance of taxes for which the liability has become fixed subsequent to June 30, 1955, pursuant to this section, after deducting any sums appropriated by the general assembly for other purposes, shall be deposited in the state treasury to the credit of the state highway bond retirement fund created by section 5528.02 of the Revised Code.

§ 5728.09 Repealed, Eff 9-30-55.

§ 5728.10 *Failure to file return; incomplete return; notice of assessment; appeal.*

In the event any person required to file a highway use tax return by the provisions of this act, fails to file such return within the time prescribed by this act, files an incomplete return, files an incorrect return, or fails to remit the full amount of the tax due for the period covered by the return, the tax commissioner may make an assessment against such person, based upon any information in his possession, for the period for which such tax was due. The tax commissioner shall give the person against whom such assessment is made written notice of such assessment either by personal service or by registered mail.

A penalty of fifteen per centum shall be added to the amount of assessment made pursuant to the provisions of this section. The tax commissioner shall have power to adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made pursuant to the provisions of this section.

Unless the person, to whom said notice of assessment is directed, shall, within thirty days after service thereof, either personally or by registered mail, file a petition in writing, verified under oath by said person, or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reasons for such

objections, and post bond satisfactory to the commissioner conditioned upon payment of the tax finally determined to be due, said assessments shall become and be deemed conclusive and the amount thereof shall be due and payable, from the person so assessed, to the treasurer of state. In every case where a petition for reassessment as above described, shall be filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered mail, but the tax commissioner shall have the power to continue same from time to time as may be necessary. Upon satisfaction of the assessment, the bond shall be canceled or returned.

Where any person shall have filed a petition for reassessment as herein provided, the assessment as made by the tax commissioner together with penalties thereon shall become due and payable within three days after notice of the finding made at the hearing has been served either personally or by registered mail upon the party assessed.

The person against whom such assessment has been made may appeal from the assessment after it is due and payable to the board of tax appeals in the same time, manner and form as that provided in section 5717.02, of the Revised Code.

After an assessment becomes conclusive a certified copy of the entry of the tax commissioner making the assessment final shall be filed in the office of the clerk of courts in the county in which the person's place of business is located or the county in which the person assessed resides, or if the person maintains no office in this state and is not a resident of this state in the office of the clerk of courts of Franklin County.

The clerk of courts, immediately upon the filing of such entry, shall enter a judgment for the people of the state of Ohio against the person so assessed in the amount shown on the entry.

From the date of the filing of the entry in the county clerk of court's office, the assessment, which includes taxes and penalty, shall bear the same rate of interest and shall have the same force and effect as other judgments. Execution shall issue upon such judgment upon request of the tax commissioner and all provisions of law applicable to sales on execution shall be applicable to sales under such judgment.

All moneys collected by the tax commissioner under this section shall be paid into the state treasury in the same manner as the revenues deriving from the taxes imposed by section 5728.06 of the Revised Code.

No assessment shall be made by the tax commissioner, as authorized by the provisions of this section, more than four years after the last day of the calendar year during which the tax was due. The provisions of this paragraph shall not bar an assessment against a person who failed to file a highway use tax return as required by this section.

§ 5728.11 *Suspension by commission; reinstatement, penalty for failure to file return.*

When the tax commissioner files a certified copy of an entry making an assessment as provided in section 5728.10 of the Revised Code, he shall suspend all highway use permits issued to the person against whom such assessment was made, provided that no highway use permit shall be suspended while an appeal is pending, except in those cases in which no return has been filed.

Upon suspension of a highway use permit the owner of the commercial car or commercial tractor for which such permit was issued shall surrender to the commissioner such permit and identification device.

Upon payment in full of such assessments and penalties the tax commissioner shall immediately reinstate all highway use permits issued to the person against whom such assessment was made which have been suspended.

In the event no returns have been filed within the time prescribed for the filing of returns, or within such extension of time for filing as the commissioner may grant in accordance with section 5728.14 of the Revised Code, the commissioner may after written notice of his intention so to do immediately suspend all highway use permits held by the person failing to file a return. Such notice shall be sent by registered mail to the last known address of such person. No permit which has been suspended for failure to file a return shall be reinstated until such person shall have filed complete and correct returns for all periods in which no return has been filed and paid the full amount of the tax due thereon. All such returns shall be accompanied with a penalty of five per cent which sum shall be considered as revenue arising from the tax imposed by section 5728.06 of the Revised Code.

§ 5728.12 *Service on nonresident.*

Any non-resident of this state who accepts the privilege extended by the laws of this state to non-residents of operating a commercial car or commercial tractor, which is subject to the tax levied in section 5728.06 of the Revised Code, or of having the same operated within this state, and any resident of this state who operates a commercial car or commercial tractor, which is subject to the tax levied in section 5728.06 of the Revised Code, or has the same operated within this state and subsequently becomes a non-resident or conceals his whereabouts, makes the secretary of state of the state of Ohio his agent for the service of process or notice in any assessment, action or proceeding

instituted in this state against such person out of the failure to pay the taxes imposed upon him by the provisions of section 5728.06 of the Revised Code.

Such process or notice shall be served, by the officer to whom the same is directed or by the tax commissioner, or by the sheriff of Franklin county, who may be deputized for such purpose by the officer to whom the service is directed, upon the secretary of state by leaving at the office of the secretary of state, at least fifteen days before the return day of such process or notice, a true and attested copy thereof, and by sending to the defendant by registered or certified mail, postage prepaid, a like and true attested copy, with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. The registered or certified mail return receipt of such defendant shall be attached to and made a part of the return of such service of process.

§ 5728.13 *Exceptions.*

The provisions of sections 5728.02 to 5728.12, inclusive, of the Revised Code, shall not apply to motor vehicles, commercial cars or commercial tractors owned and operated by the United States, this state or any political subdivisions thereof, nor to motor vehicles, commercial cars or commercial tractors owned by non[-]residents of this state while engaged solely in the interstate transportation of household goods in Ohio, provided such owner has complied with the laws of the state, district or territory of his residence pertaining to the registration and taxation of motor vehicles and complies with such laws while operating and driving such motor vehicle upon the public roads or highways of this state, and provided further, that the owners of motor vehicles similarly engaged and registered in this state shall be exempt from all obligations pertaining to the registration and taxation of motor vehicles in such other

states, districts or territories. Provided that the provisions of this section shall not apply to vehicles, commercial cars or commercial tractors owned by non-residents of this state when operated by a resident under lease or any other arrangement. The tax commissioner shall be authorized to determine whether or not such other states, districts or territories exempt such Ohio registered vehicles from all obligations pertaining to the registration and taxation of such motor vehicles and to prescribe such rules and regulations as are required for the purpose of administering the provisions of this section.

Household goods shall mean all goods consisting of personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwellings and furniture, fixtures, equipment and the property of stores, offices, museums, institutions, hospitals, or other establishments when part of the stock, equipment or supply of such stores, offices, museums, institutions, hospitals, or other establishments, and articles including objects of art, displays and exhibits, which because of their unusual nature or value require specialized handling and equipment usually employed in moving household goods.

§ 5728.14 *Powers of tax commissioner.*

In addition to any other powers conferred upon him by law the tax commissioner shall have the following powers:

(A) To prescribe all forms required to be filed with the treasurer of state or the tax commissioner pursuant to the provisions of sections 5728.01 to 5728.17, inclusive, of the Revised Code;

(B) To appoint and employ such personnel as may be necessary to carry out the duties imposed upon him by the provisions of sections 5728.01 to 5728.17, inclusive, of the Revised Code;

(C) To adopt and promulgate such rules and regulations pertaining to the levy and collection of the tax imposed by sections 5728.01 to 5728.17, inclusive, of the Revised Code as he may deem necessary;

(D) To release any property from the lien of any fees, taxes, penalties or interest imposed by sections 5728.01 to 5728.17, inclusive, of the Revised Code upon application, provided payment be made to the treasurer of state for the full amount of all taxes and penalties due;

(E) To extend, for cause shown, the time of filing any return required to be filed by the provisions of sections 5728.01 to 5728.17, inclusive of the Revised Code for such period as he may deem reasonable.

§ 5728.15 [*Reciprocal contracts and agreements.*]

The attorney general, the tax commissioner, and a member of the public utlities commission, designated by the commission for that purpose, are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state, district or territory of the United States, which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of sections 1 through 14 [RC §§5728.01 through 5728.14] of this act the owner of every motor vehicle which is duly registered in any such state, district or territory provided such owner has complied with the laws of the state, district or territory of his residence pertaining to the registration and taxation of motor vehicles and complies with such laws while operating and driving such motor vehicle upon the public roads or highways of this state, and provided further, that the owners and operators of motor vehicles registered in this state shall be exempt from all obligations pertaining to the registration and taxation of motor vehicles in such other state, district or territory.

When an agreement or contract has been entered into pursuant to the provisions of this section the attorney general shall cause a copy of such agreement or contract to be filed with the registrar of motor vehicles.

* * * * *

§ 5728.99 *Penalties.*

(A) Whoever violates sections 5728.01 to 5728.17, inclusive, of the Revised Code, or any rule or regulation promulgated by the tax commissioner under the authority of such sections, for the violation of which no penalty is provided elsewhere, shall be fined not less than twenty-five nor more than one hundred dollars.

(B) Whoever violates section 5728.02, 5728.06, or 5728.08 of the Revised Code, by filing or causing to be filed a false or fraudulent return or application, shall be fined not more than two hundred fifty dollars for a first offense; for each subsequent offense, such person shall be fined not less than two hundred fifty or more than one thousand dollars or imprisoned not more than ninety days, or both.

(C) Whoever violates section 5728.04 of the Revised Code shall be fined not more than one hundred dollars for a first offense; for each subsequent offense such person shall be fined not less than one hundred nor more than five hundred dollars.

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JUN 13 1958
JOHN T. FEY, Clerk

No. [redacted]65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

On Appeal from the Supreme Court of Ohio

GEO. F. ALGER COMPANY,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

WILLIAM SAXBE,
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State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 995

GEO. F. ALGER COMPANY,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS

Appellee in the above styled case, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

The appellant is a Michigan corporation engaged in the commercial transportation of property by motor vehicles in interstate commerce.

On July 16, 1953, the Ohio highway use tax law, also known as the axle mile tax law, became effective. This tax required payment for use of Ohio highways of from one-half

to two and one-half cents per mile depending upon the number of axles employed. Vehicles having less than three axles were not included in the classification amenable to the tax.

The Tax Commissioner of Ohio, by virtue of the Ohio highway use tax law, levied assessments against appellant based upon the use of Ohio highways for the periods of April 1, 1954, to June 30, 1954, and October 1, 1955, to December 31, 1955.

The Tax Commissioner's assessments were appealed, eventually resulting in an upholding of his assessments by the Supreme Court of Ohio and a declaration that the Ohio highway use tax law was a valid exercise of the taxing power and that no constitutional safeguards were endangered by the tax.

ARGUMENT

Appellant has raised two principal questions: whether the Ohio highway use tax law is unconstitutional and whether the fact that the Ohio reciprocity board created by Section 5728.15, Revised Code of Ohio, has not entered into reciprocal agreements, pertaining to highway use taxation, with the state of Michigan, denies appellant due process of law and violates the Commerce Clause of the Constitution of the United States.

It is the position of the appellee that these questions are so unsubstantial as not to warrant review by this Court.

Two basic concepts will serve as important guides in viewing the issues here involved in proper perspective:

1. The real legislative purpose in enacting the Ohio highway use tax law was to raise revenue for highway purposes.

2. The users of the highways should pay a fair share of the cost of construction and maintenance thereof.

I

The Ohio Highway Use Tax is Not Unconstitutional

State statutes levying highway use taxes have been considered by this Court on many occasions. These statutes have been consistently held within constitutional limitations unless discriminatory, excessive, levied for an improper purpose, or levied for the privilege of doing business. *Capital Greyhound Lines v. Brice*, 339 U. S., 542; *Hendrick v. Maryland*, 235 U. S., 610, 623, 624.

None of these characteristics can be attributed to the Ohio law.

The tax is nondiscriminatory. All vehicles subject to the tax are taxed according to the same formula whether

used in interstate commerce or intrastate commerce. The exemption of two-axle vehicles was provided by the Ohio General Assembly after thorough studies of the problems of highway construction and wear including the loadometer reports, Appellee's Exhibits A through E, in addition to a consideration of economic factors. The mere fact that expert testimony presented by appellant does not accord with the legislative conclusion is not determinative. Additionally, as observed by the Supreme Court of Ohio at page 428 of *Geo. F. Alger Co. v. Bowers,* 166 Ohio St., 427:

> "* * * It is axiomatic that the General Assembly in imposing a tax has the power to make reasonable classifications therein exempting from the tax persons who in some other way contribute their fair share to the maintenance of the operation for which the tax is imposed. In relation to the highway use tax, it was evidently the opinion of the General Assembly that the owners of trucks with only two axles carried their fair share of the cost of the operation and maintenance of highways through the imposition of the other motor vehicle taxes. It further must have determined that the relative damage to the highways increased proportionately with the number of axles. All these are questions of fact which must be determined by the General Assembly, and, its determination being neither unreasonable nor arbitrary, the court will not substitute its judgment for that of the General Assembly."

The tax is not excessive. Mr. O'Leary of the Department of Finance testified (R., 276, et seq.) that for the fiscal year ending June 30, 1954, the state collected approximately $189 million from various highway taxes, of which approximately $5.4 million came from the axle-mile tax which was effective only part of that period (R. 280-281). He also testified that for the first four months of the fiscal year ending June 30, 1955, axle-mile collections approximated $5.3 million, while other highway taxes were

continuing at about the 1954 rate (R., 308-309). There is no limitation, statutory or constitutional, on the amount which the state may raise and spend for highway purposes. Further, even if the state were restricted to an over-all amount, there is nothing which requires it to eliminate the revenue from the axle-mile tax. The highways of Ohio are built, owned and maintained by the state of Ohio. Whether the federal government, as of 1956, has assumed 90% of the cost of interstate highways is immaterial. *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S., 495, 92 L. Ed., 99. The financial strain upon appellant's business is likewise immaterial. *Grolbert v. Board of Railroad Commissioners of State of Iowa,* 60 F. 2d, 321. The axle-mile tax is predicated upon the use of Ohio highways and the state of Ohio is entitled to charge for that use. *Capital Greyhound Lines v. Brice,* 339 U. S., 542.

The purpose of the Ohio highway use tax is proper. The tax is levied exclusively for highway purposes. Sections 5728.06 and 5728.08, Revised Code of Ohio, specify the use to be made of the revenues raised by the levy. The base of the tax is mileage traveled in Ohio, which indicates a contribution for the use of the highways as opposed to payment for the privilege of doing an interstate business. See *Interstate Transit, Inc., v. Lindsey,* 283 U. S., 183. Additionally, Article XII, Section 5a, of the Ohio Constitution prohibits the expenditure of such taxes for other than highway purposes.

Highway use taxes based upon weight and distance have been consistently sanctioned. *Continental Baking Co. v. Woodring,* 286 U. S., 352; *Grolbert v. Board of Railroad Commissioners of State of Iowa,* 60 F. 2d, 321; *Mid-State Freight Lines v. Bates, et al.* (N. Y.), 279 App. Div., 451, 111 N. Y. S. 2d, 578, affirmed without opinion 304 N. Y., 700, 107 N. E. 2d, 603, certiorari denied 345 U. S., 908; and *State v. Goeson,* 65 N. D., 706, 262 N. W., 70. The selec-

tion, by the Ohio General Assembly, of axles in substitution for weight would seem to be within the broad latitude authorized the states in devising a formula for exacting compensation for highway use.

There is a reasonable relationship between the Ohio formula of highway use taxation and highway use. Section 5577.04, Revised Code of Ohio, appended hereto, establishes load limits for single axle and for axle combination and spacing. Exhibit 2 shows that the graduations of the Ohio highway use tax are proportionate to actual load limits. Exhibit C-1 shows that in actual studies of highway loads transported the proportionate graduations existed. While there may not be a mathematical exactness in the Ohio formula, in consideration of the administrative convenience which will accrue to the state of Ohio from the application of the formula, it is certainly within the area of "rough approximation." *Capital Greyhound Lines v. Brice*, 339 U. S., 542; *Grolbert v. Board of Railroad Commissioners of State of Iowa*, 60 F. 2d, 321; and *Roadway Express v. Murray*, 60 F. 2d, 293.

II

The Refusal of the Ohio Reciprocity Board to Enter Into Reciprocal Agreements With the State of Michigan Waiving the Ohio Highway Use Tax Does Not Deprive Appellant of Due Process of Law

Reciprocity is not an essential of valid highway use taxation. *Kane v. New Jersey*, 242 U. S., 160.

The legislative intent in the enactment of the Ohio highway use tax law was to raise revenue for highway purposes. Section 5728.06, Revised Code of Ohio.

Reciprocity denotes a mutual exchange of favors. The provisions of Section 5728.15, Revised Code of Ohio, authorize reciprocal agreements with other states which levy a highway use tax in addition to motor vehicle registration

fees. The state of Michigan does not levy a highway use tax, as contended by the appellant, but, rather, the so-called Michigan highway use tax is in reality a public utility fee, comparable to a like imposition by the state of Ohio. Beyond this the Michigan public utility fee is graduated from 1 to 2 mills per mile, one-tenth the amount of the Ohio highway use tax, thus negativing the possibility of a mutual exchange of favors, even if the Michigan public utility fee could be considered a highway use tax.

The Ohio reciprocity board is authorized to confer with legislative bodies and other proper officials of sister states in determining whether to reciprocally waive the highway use tax. Nothing in this authorization and nothing in the nature of the problem requires that the Ohio reciprocity board confer with appellant, or give appellant an opportunity to be heard, before deciding whether a particular reciprocity agreement would be in the best interest of the state of Ohio.

CONCLUSION

This appeal does not present a substantial constitutional question which requires review by this Court. Accordingly, the motion to dismiss should be granted.

Respectfully submitted,

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APPENDIX

Section 5577.04, Revised Code of Ohio

No vehicle, trackless trolley, load, object, or structure having a maximum axle load greater than sixteen thousand pounds when such vehicle is equipped with solid rubber tires, or greater than nineteen thousand pounds when such vehicle is equipped with pneumatic tires, shall be operated or moved upon improved public highways, streets, bridges, or culverts. The maximum wheel load of any one wheel of any such vehicle shall not exceed six hundred fifty pounds per inch width of tire, measured as prescribed by section 5577.03 of the Revised Code, nor shall any solid tire of rubber or other resilient material, on any wheel of any such vehicle, be less than one inch thick when measured from the top of the flanges of the tire channel.

The weight of vehicle and load imposed upon the road surface by any two successive axles, spaced four feet or less apart, shall not exceed nineteen thousand pounds for solid tires, nor twenty-four thousand pounds for pneumatic tires; or by any two successive axles, spaced more than four feet but less than eight feet apart, shall not exceed twenty-four thousand pounds for solid tires, nor thirty-one thousand five hundred pounds for pneumatic tires; or by any two successive axles, spaced eight feet or more apart, shall not exceed twenty-eight thousand pounds for solid tires; nor thirty-eight thousand pounds for pneumatic tires; nor shall the total weight of vehicle and load exceed, for solid rubber tires, twenty-eight thousand pounds plus an additional six hundred pounds for each foot or fraction thereof of spacing between the front axle and the rearmost axle of the vehicle, nor exceed thirty-eight thousand pounds

plus an additional eight hundred pounds for each foot of spacing between the front axle and the rearmost axles of the vehicle for pneumatic tires; nor shall the weight of vehicle and load imposed upon the road surface by any vehicle exceed seventy-eight thousand pounds for pneumatic tires; nor shall such weight of vehicle and load exceed, for solid tires, eighty per cent of the permissible weight of vehicle and load, as provided for pneumatic tires.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 65

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OPPOSING MOTION TO DISMISS

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SUBJECT INDEX

	Page
Jurisdiction	2
Questions Presented	2-4
Argument:	
I. The Question as to Constitutional Invalidity of the Ohio Axle-Mile Tax Law as Applied to Exclusively Interstate Motor Carriers is Substantial	4-12
II. The Qaestion as to Constitutional Invalidity of the Ohio Axle-Mile Tax Law With Respect to Assessments Thereunder Levied Pursuant to the Arbitrary and Inflexible "No-Reciprocity" Policy Applied by Appellee and Other State Officials is Substantial	13-21
Conclusion	22

INDEX OF AUTHORITIES CITED

Cases:

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 (1947)	9
Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937)	19
Anti-Fascist Committee v. McGrath, 341 U. S. 123 (1950)	17, 19
Buck v. Kuykendall, 267 U. S. 307 (1925)	10
Capitol Greyhound Lines v. Brice, 339 U. S. 542 (1950)	4, 6, 7, 8, 21
Dixie-Ohio Express Company v. Commissioner, 306 U. S. 72 (1939)	9
Embree v. Kansas City Road District, 240 U. S. 242 (1916)	19

Page

Garfield v. United States, 211 U. S. 249 (1908).... 19
Geo. F. Alger Co. v. Bowers, 166 Ohio State 427, 143 N. E. (2) 835, 836.....5, 15, 16
Hendrick v. Maryland, 235 U. S. 610 (1915)..... 10
Interstate Motor Freight System v. Bowers, 164 Ohio State 122, 128 N. E. (2) 97 (1955)..... 19-20
Kane v. New Jersey, 242 U. S. 160 (1916)..... 15
Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U. S. 405 (1935)..... 11
Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 155 F. Supp. 768 (E. D. Pa. 1957) 6
Raley v. Ohio, 354 U. S. 929 (1957)..... 16
Rindge Company v. Los Angeles, 262 U. S. 700 (1923) 19
Southern Pacific Railway v. Arizona, 325 U. S. 761 (1945) 7
Southern Railway Co. v. Virginia, 290 U. S. 190 (1933) 18
State ex rel. Interstate Motor Freight System v. O'Neill, 167 Ohio State 139, 146 N. E. 720 (1957) 16
Sweezey v. New Hampshire, 354 U. S. 234 (1957) 16
Uphaus v. Wyman, 355 U. S. 16 (1957)..... 16
U. S. ex rel. Turner v. Fisher, 222 U. S. 204 (1911) 19
Yick Wo v. Hopkins, 118 U. S. 356 (1886)..... 17

Statutes:

Ohio Axle-Mile Tax Law, Rev. Code of Ohio, Secs. 5728.01-5728.15, 5728.99 .....3, 13, 15, 20
United States Code:
Title 23, Sec. 23(a), 62, 151 et seq..... 9

Congressional Reports: Page

Staff Report to the Committee on Interstate and Foreign Commerce, "State Taxation of Interstate Trucking and the Reciprocity Problem", House Doc. 449, 84 Congress 2nd Sess., July 16, 1956 ..... 14, 21

Law Review Commentary:

Note, The Ohio Axle-Mile Tax, 23 U. of Cinn. Law Rev. 442 (1954)..... 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 995

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OPPOSING MOTION TO DISMISS

Appellant, Geo. F. Alger Company (hereinafter sometimes called "Alger"), pursuant to this Court's Rule 16(3), files this Brief Opposing the Motion to Dismiss made by Appellee, Tax Commissioner of the State of Ohio.

JURISDICTION

The Jurisdictional Statement* herein, dated May 12, 1958, clearly and incontrovertibly sets forth, and no challenge whatever is made by Appellee with respect to, the following jurisdictional bases of this appeal, namely:

(a) That the appeal is taken in conformity to statute and the Rules of this Court (J. S. 2-3, 6-8);

(b) That both federal constitutional questions presented on this appeal were timely and properly raised in the courts below (J. S. 4-8); and

(c) That both said federal constitutional questions were passed on by the Supreme Court of the State of Ohio and that its judgment did not rest on an adequate non-federal basis (J. S. 3, 7-8).

This Brief is accordingly addressed to the sole issue raised by the Motion to Dismiss, namely, the substantiality of the federal constitutional questions presented.

QUESTIONS PRESENTED

Since the Motion to Dismiss has not stated the constitutional questions completely, we restate them here in the light of the circumstances of the case:

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*Throughout this Brief references to pages of the Jurisdictional Statement will be cited as "J. S. —"; references to pages of the printed record before the Supreme Court of Ohio in the present case will be cited as "R. —"; references to pages of the transcript of testimony in Board of Tax Appeals cases Nos. 27151 and 27152, which is Exhibit 1 in Board of Tax Appeals Case No. 30565, will be cited as "Tr. —"; and references to Exhibits 2 through 17 and A through K in Board of Tax Appeals Case No. 30565, and Exhibits 101 through 109 in Board of Tax Appeals Case No. 32604, will be by number as "Ex. —."

This appeal involves the constitutionality of the Ohio Axle-Mile Tax Law as amended, Rev. Code of Ohio, Secs. 5728.01-.15 inclusive and Sec. 5728.99 (J. S. Appendix B, 46a-62a), as applied to a common motor carrier operating exclusively in interstate commerce (R. 77, 84; Tr. 11, 418-20) in Illinois, Indiana, Kentucky, Michigan and Ohio, under authority of the Interstate Commerce Commission (R. 77, 84), utilizing Federal-Aid Highways in Ohio almost 100% (Tr. 40, 364; R. 77, 84). Alger so operates in Ohio vehicles having three or more axles, registered in and with respect to which a tax is paid to other states, including Michigan and Indiana (Tr. 418-19; R. 4), which levy highway use taxes in addition to motor vehicle registration fees, but with which states no reciprocal exemption agreements have been entered into by Ohio as authorized by Section 5728.15 of the Ohio Axle-Mile Tax Law (R. 59-60; Tr. 303, 422) as the result of an arbitrary and inflexible "no-reciprocity" policy (J. S. 10-12; *infra* pp. 13-14) adopted by Appellee and other state officials *to make no reciprocal exemption agreements whatever under the Ohio Axle-Mile Tax Law.* In the light of the foregoing, the two questions presented are:

I. Whether the Act, on its face and as applied to such interstate motor carriers, violates the Commerce Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Federal Constitution, because it is unreasonable and discriminatory, imposes an intolerable financial burden upon such carriers, unduly burdens and restricts the free flow of interstate commerce, and imposes taxes far in excess of and having no reasonable relation to fair compensation to Ohio for use by such carriers of such highways in said State.

II. Whether the Act as applied and construed in this case, with respect to assessments covering Michigan- and

Indiana- registered vehicles, is rendered void and in violation of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution, because such "no-reciprocity" policy in the face of Sec. 5728.15, is wholly arbitrary, non-discretionary and inflexible, is not subject to the control of and is in conflict with the objectives of the Ohio Legislature, and deprives Appellant and other similarly situated motor carriers of property without notice and hearing and without due process of law, and unduly burdens interstate commerce.

ARGUMENT

I.

THE QUESTION AS TO CONSTITUTIONAL INVALIDITY OF THE OHIO AXLE-MILE TAX LAW AS APPLIED TO EXCLUSIVELY INTERSTATE MOTOR CARRIERS IS SUBSTANTIAL

While at the very outset of the Motion to Dismiss Appellee states that "highway use taxes have been considered by this Court on many occasions" (Motion, p. 2), the fact is that this Court has *never* passed upon a state highway mileage tax law with variations in the tax rate based solely on the number of axles, *without regard to weight or load.* Most certainly, it has never had before it a "third structure" highway tax statute involving anywhere near the excessively large amounts of tax upon exclusively interstate motor carriers, as those involved in this appeal. See *Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 561 (1950), Appendix to opinion of Frankfurter, J., detailing all such cases which have previously come before this Court.

Never before has this Court been faced with a state highway tax which, because of its nature and amounts involved and the arbitrary manner of its administration with respect to interstate carriers, has engendered such serious controversy among states and such retaliation by other states, actual and potential, as now exists in connection with the Ohio Axle-Mile Tax Law (See J. S. 14-15; *infra* pp. 14, 21).

In no previous case before this Court has a motor carrier engaged exclusively in interstate commerce presented in the courts below a complete and devastating factual record, showing that a state highway tax is arbitrary, discriminatory and wholly unrelated to fair compensation to the State for its share of the roads used by such carrier, and so excessive as to preclude continued profitable operation of such interstate carrier, only to be told by the highest court of the State that such evidence "would have better been directed to the General Assembly (See Opinion Below, 143 N. E. (2d), at p. 836; J. S. Appendix A, 2a).

In arguing that the tax is non-discriminatory, the Motion merely states that the same formula applies to vehicles used in interstate as in intrastate commerce (Motion, pp. 3-4). But in the record in this case there is voluminous *and uncontroverted* evidence (Ex. 2, Tr. 18-19; Ex. 5, Tr. 195, 268; Ex. 5 (a), Tr. 267) showing that because the Act imposes a tax varying arbitrarily with the type of vehicle and the number of axles in excess of two, wholly without regard to weight *or to whether the vehicle be empty or loaded*, and because the tax is not imposed upon all axles, the Ohio Axle-Mile Tax Law has "built-in" discrimination, reflected in arbitrary variations in its incidence, to Appellant's substantial prejudice. The record shows variations in tax rate per axle of from 1/6¢ per mile to ½¢ per mile,

and in annual tax per axle of from $150 to $450 for vehicles carrying the same weight (Ex. 5, Table VI, Tr. 195), the higher rates being applicable to the types of vehicles used by Alger in interstate commerce.

The Motion makes patently unsound attempts to argue that the tax is not excessive under *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950) and other decisions involving state highway taxes on interstate commerce.

The assertion (Motion, p. 4) that the Ohio State Legislature, in adopting the Ohio Axle-Mile Tax Law, made studies of highway construction and wear and considered in this connection loadometer reports in evidence below (Exs. A-E, Tr. 372) is not supported by any evidence. In fact, Appellee's own witness testified that these Exhibits were prepared only for use by the Bureau of Public Roads and Department of Highways, and not for any legislative committee (Tr. 342). The statement in the Motion as to the Ohio General Assembly's "consideration of economic factors" (Motion, p. 4) impels us to direct to this Court's attention the findings made by a Federal District Court in *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference*, 155 F. Supp. 768 (E. D. Pa. 1957) that "slanted statistics" were furnished to representatives of the Ohio Legislature in connection with the Ohio Axle-Mile Tax Law by the then Director of the Ohio Department of Highways (See 155 F. Supp. at 784-86).

Reliance by the Appellee upon the determination imputed to the Ohio Legislature and the opinion of the Supreme Court of Ohio below as establishing the non-excessiveness of the axle-mile tax beyond review by this Court (Motion, p. 4) is also legally unsound. It is well established that "this Court, and not the State Legislature, is under the Commerce Clause, the final arbiter of the competing de-

mands of state and national interest," *Southern Pacific Railway Co. v. State of Arizona*, 325 U. S. 761, 769 (1945).

The attempted belittlement of the amounts of tax involved under the Ohio Axle-Mile Tax Law by reference to figures of $5.4 million and $5.3 million as the amounts of tax collected for parts of fiscal years 1954 and 1955 (Motion, p. 4), does not even begin to apprise this Court of the tremendous total amounts of tax actually involved under the Ohio Axle-Mile Tax Law. Adjustments of the figures cited by Appellee in the Motion to reflect full years (3 x 5.3 million = 15.9 million) and to reflect the large amounts of unpaid levies upon interstate carriers like Alger which are pending awaiting the outcome of this appeal (average at least 3.7 million per year based on official figures furnished by Ohio Department of Taxation), shows that the Ohio Axle-Mile Tax Law, if it is applied as Appellee proposes herein, would involve taxes totaling approximately $20,000,000 per year.

Appellee contends that there is no constitutional limitation "on the amount which the state may raise and spend for highway purposes" (Motion, p. 5). But the decision of this Court in the *Brice* case, *supra*, establishes the constitutional principle that where interstate motor carriers demonstrate that the total amount which a state is raising by way of highway taxes is out of line, this will render such taxes invalid on the ground that "the amount of the tax exceeded fair compensation to the State" (see 339 U. S. at 544). As the majority decision in the *Brice* case states:

> "Our adherence to existing rules does not mean that any group of carriers is remediless if the total Maryland taxes are out of line with fair compensation due to Maryland. Under the rules we have previously prescribed, such carriers may challenge the

> taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied." (339 U. S. at 547.)

The record below contains such proof in the form of uncontroverted evidence showing that total highway taxes, including the axle-mile tax, exacted by Ohio during 1954, exceeds by more than $23,000,000 the revenues needed to finance the Ohio State Highway Program as announced by the State (Ex. 5, Table VII, Tr. 182-195). The Supreme Court of Ohio apparently paid no attention to this evidence, since it made no comment upon it. Only through this appeal will Appellant be enabled to have its day in court on this issue, so clearly material to constitutionality.

The Motion states (Motion, p. 5) that "the financial strain upon Appellant's business is likewise immaterial".* *But this Court has expressly ruled to the contrary.* The principle of the majority decision of this Court in the *Brice* case, *supra*, as noted by Mr. Justice Frankfurter in his dissent, is that the validity of a state highway tax as applied to interstate commerce is, among other things, to be tested "by the size of the financial burden which such a tax entails" (339 U. S. at 554, see also at 555).

The record below contains specific evidence, in no way controverted, showing that application of the axle-mile tax to Alger's operations for the year 1953 would result in a total axle-mile tax of $204,559 for such year and would turn its profit before taxes of $157,792 into a loss of $3,009 (Ex. 10, Tr. 59-71), without allowing for administration cost of about 8¢ per dollar of such tax assessed (Tr. 41); that if such tax were in existence in each of the five states served by Alger, the tax would amount to $511,375,

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*The only case cited in the Motion for this proposition is a district court decision which contains no express discussion of the point.

resulting in a loss of $309,825 (Id.); that total annual Ohio highway taxes applied to Alger's vehicles would be up to $4,262 per vehicle; and that the annual Ohio axle-mile tax alone would amount to as much as $2,250 per vehicle (Ex. 5, Tables II-A, III-A, Tr. 195, 123-133).

These amounts far exceed any direct highway tax on interstate motor carrier operations heretofore considered by this Court. The total annual axle-mile tax on Alger of $204,559 is 34 times the total involved in *Dixie-Ohio Express Company v. Commissioner,* 306 U. S. 72 (1939), and the maximum axle-mile tax per vehicle of $2,250 is 4½ times that involved in the *Brice* case, *supra.*

These tremendous amounts of tax are presented on this appeal against the background of a new and important development in Congressional legislation which has taken place since the previous decisions of this Court dealing with "third structure" highway taxes as applied to interstate motor carriers. Under the Federal Highway Aid Act of 1956 (23 U. S. C., Sec. 25(a), 62, 151 *et seq.*) the federal government has now assumed 90% of the cost, so that Ohio only pays 10% of the cost, of the Federal-Aid Highways upon which practically all of Alger's operations are performed (Tr. 40, 346). Indeed Ohio pays none of the costs with respect to urban system highways and streets in Ohio upon which Alger operates (Tr. 362) and as to which Ohio claims a right to "compensation."

It cannot be seriously contended, as the Motion purports to do (Motion, p. 5), that this constitutional question, related on the appeal to a framework of Congressional legislation not enacted until 1956, is foreclosed by a one-sentence footnote in the decision of this Court 11 years ago in *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S. 495, fn. 16, 503 (1947),

in the completely different context of that earlier case. The *Aero Mayflower* case involved a flat tax (not a mileage tax) of $25 per vehicle as against $2,250 in this case (Ex. 5, Table II-A, Tr. 195, 123-133); did not involve, as here, practically 100% use of Federal-Aid Highways (Tr. 40, 364); and any federal aid to highways at the time of that case was far short of the 90% of cost now and here involved.

The *Aero Mayflower* approach is completely inapplicable under present-day conditions, and particularly to the facts involved in this appeal. Here, this Court must be mindful that in the landmark case of *Hendrick v. Maryland*, 235 U. S. 610 (1915), the basis for state compensatory highway taxation upon interstate commerce was said to be that:

> "Where a state *at its own expense* furnishes *special facilities* for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation *therefor*." (235 U. S. at 623.) (Emphasis ours.)

The statement in the Motion that "The highways of Ohio are built, owned and maintained by the State of Ohio" (Motion, p. 5) is basically irrelevant to the issue on this appeal, since the Federal-Aid Highways, which are substantially the only ones used in Ohio by Alger, and other similarly situated interstate carriers (Tr. 40, 364), are *not* built and maintained by Ohio solely "at its expense".

This Court has in the past frequently adverted to the factor of increasing federal aid to highways located within the states in determining the reasonableness of state action affecting interstate commerce on the highways. See e.g. *Buck v. Kuykendall*, 267 U. S. 307, 314, 316 (1925). It should most certainly evaluate the constitutionality of

the Ohio Axle-Mile Tax Law, as now applied to Alger, in the light of the actual facts *as they exist today* in relation to the expense incurred by Ohio with respect to the specific interstate facilities used by Alger, for which Ohio may constitutionally exact only "fair compensation". Cf. *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405, 417 (1935).

The Motion cites court decisions upholding highway use taxes "based upon *weight* and distance", and goes on, quite disingenuously, to state that "the selection, by the Ohio General Assembly, of axles in substitution for weight would seem to be within the broad latitude authorized the states in devising a formula for exacting compensation for highway use" (Motion, pp. 5-6).

But this completely disregards the factual situation presented in the record below (J. S. 13-18). The record contains Exhibits (Ex. 2, Tr. 18-19), carefully prepared and fully presented engineering studies (Exs. 5, Tr. 195, 268; Ex. 5(a), Tr. 267), and oral testimony by acknowledged experts (Tr. 107-207, 211-244, 90-105, 246-264), all demonstrating forcefully that the "formula" (if it can be designated such) embodied in the Ohio Axle-Mile Tax Law results in unfair and discriminatory variations in tax incidence, completely without regard to the weight of vehicles or to whether vehicles are loaded or unloaded, and without regard to wear thereof upon the roads, so that the amounts of tax involved are excessive and wholly unrelated to "fair compensation" to the State of Ohio.

On such a record, it is patently unsound for Appellee to argue that decisions upholding highway taxes based on a combination of *weight* and distance have any bearing on the validity of the wholly arbitrary Ohio Axle-Mile "formula" proven by facts of record below to have no relationship at

all to road use or wear. Such uncontradicted evidence of record effectively negates the statement in the Motion (at p. 6) that there is "a reasonable relationship between the Ohio formula of highway use taxation and highway use." The evidence goes far beyond the limited purpose attempted to be attributed to it in the Motion (at p. 4) of merely challenging the 2-axle exemption.

The Motion makes the surprising statement that "Exhibit 2 shows that the graduations of the Ohio highway use tax are proportionate to actual load limits" (Motion, p. 6). Actually, Exhibit 2 (Tr. 19), together with other evidence of record (Ex. 5, Tr. 195, 268; Ex. 5(a), Tr. 267; Tr. 107-8, 221-3), makes it clear that the Ohio Axle-Mile Tax Law is entirely outside the principle of "rough approximation" stated in the *Brice* case.

In short, the Ohio "formula" is shown by the record herein to be so completely devoid of *any* "approximation" whatever to fair compensation to Ohio for Alger's interstate use of Federal-Aid Highways in that State, and to result in taxes so excessive upon Alger and other interstate motor carriers, that it gives rise to most substantial questions of constitutional invalidity under the Commerce, Due Process and Equal Protection Clauses, meriting a full review by this Court.

II.

THE QUESTION AS TO CONSTITUTIONAL INVALIDITY OF THE OHIO AXLE-MILE TAX LAW WITH RESPECT TO ASSESSMENTS THEREUNDER LEVIED PURSUANT TO THE ARBITRARY AND INFLEXIBLE "NO-RECIPROCITY" POLICY APPLIED BY APPELLEE AND OTHER OHIO OFFICIALS IS SUBSTANTIAL

In enacting the Ohio Axle-Mile Tax Law, the Legislature of the State of Ohio itself inserted in the Act a reciprocity Section, Rev. Code of Ohio, Sec. 5728.15, by which Appellee and two other officials of the State

> "* * * are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state * * * which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of Sections 1 through 14 of this act the owner of every motor vehicle which is duly registered in any such state * * *"

with the proviso that owners and operators of Ohio-registered vehicle be reciprocally exempted from the motor vehicle tax and registration laws of such other state.

In the face of the above section inserted in the Act by the Ohio Legislature, Appellee and the other designated State officials, in their administration of the Ohio Axle-Mile Tax Law, have taken it upon themselves completely and irrevocably to deprive Alger and other similarly situated interstate motor carriers of the opportunity for reciprocal exemption which the Legislature specifically provided.

This has occurred through the admitted adoption by Appellee and the other Ohio officials, and Appellee's application, in levying the assessment under the Ohio Axle-Mile

Tax Law involved in this appeal, of a fixed and inflexible "no-reciprocity" policy. Such policy is established of record below by their sending of uniform notices to every State with which Ohio had a reciprocal exemption agreement, canceling such agreements (R. 9; 59-62); their failure and refusal to enter into a single reciprocal exemption agreement with any State as provided in Section 5728.15 (see Tr. 303; R. 59-60); their arbitrary refusal, without stated reason, to sign on behalf of the State of Ohio a reciprocal exemption agreement signed and tendered to them by the proper officials of the State of Michigan, in accordance with the provisions of said Section 5728.15 (R. 12-16; 66-75), despite a statement by the Michigan officials that concurrence in the Ohio position would deny "Michigan citizens their inherent statutory rights by whim or caprice" (R. 63); and their insistence upon express exclusion of the Ohio Axle-Mile Tax Law from any and all reciprocal exemption agreements.

The existence of this unusual, indeed extraordinary, "no-reciprocity" policy with respect to the Ohio Axle-Mile Tax Law has been expressly noted by Congress in H. Res. 407, 83rd Cong., 2nd Sess., providing for an investigation "with particular reference to the discriminatory and unilateral refusal of the State of Ohio to grant such reciprocal exemption from its axle-mile tax." (Staff Report to the Committee on Interstate and Foreign Commerce "State Taxation of Interstate Trucking and the Reciprocity Problem," 84th Cong., 2nd Sess., House Document No. 449, July 16, 1956, p. 63.)

The second constitutional question on this appeal challenges the validity of the Ohio Axle-Mile Tax Law in its specific application and administration by Appellee and the other Ohio officials pursuant to their own arbitrary, inflexible and non-discretionary "no-reciprocity" policy as

shown in the record below. This issue is entirely unique, arising out of a situation which has never before existed in the history of state highway taxation of interstate motor carriers, and one with which this Court has most certainly never previously been confronted.

The Motion to Dismiss does not cite a single decision of this or any other Court bearing on this constitutional issue. The Motion only cites *Kane v. New Jersey*, 242 U. S. 160 (1916), for the proposition that "reciprocity is not an essential of a valid highway use taxation" (Motion, p. 6). That case, arising in 1916 and involving a state registration tax with a maximum of $10, merely holds that in the light of conditions applicable in the year 1916 and the nature and amount of the particular highway tax there involved, an automatic grant of reciprocity *by the State Legislature* was not constitutionally requisite.

However, we are not questioning the constitutional power of the Ohio State Legislature to deny reciprocity. The Legislature did make provision therefor in Section 5728.15. What we challenge here is the arbitrary adoption and application of a fixed and inflexible "no-reciprocity" policy by Appellee and other Ohio officials (who are most certainly *not* the Ohio Legislature) in the administration of the Ohio Axle-Mile Tax Law. We contend that this specific application renders the Law invalid because it involves a denial of the fundamentals of Due Process to Alger and others similarly situated with respect to Michigan- and Indiana-registered vehicles which would be exempted under a valid application of the Law, and also unduly burdens and restricts interstate commerce.

In the opinion below, the Supreme Court of Ohio ruled merely that Section 5728.15 is not mandatory. The Court's actual interpretation of the Section is ambiguous, since it merely stated that

> "* * * it was clearly not the intent of the General Assembly to have an automatic reciprocity with the other states in relation to the axle mile tax but instead left it to the discretion of and for the determination of the board." (J. S. Appendix A, 8a.)

Having sanctioned (at least by silence) the "no-reciprocity" policy in its opinion below, the Supreme Court of Ohio, in *State ex rel Motor Freight System v. O'Neill*, 167 Ohio State 139, 146 N. E. (2d) 720 (December 18, 1957) has subsequently held that mandamus would not lie to review this inflexible and non-discretionary policy.

The primary constitutional question presented by the foregoing is one of due process under the Fourteenth Amendment.

If the quoted portion of the decision of the Supreme Court of Ohio appealed from is construed as meaning that the Ohio Legislature in enacting the Ohio Axle-Mile Tax Law conferred upon Appellee and the other state officials named its plenary legislative power over reciprocity, with the wholly unrestricted power to formulate any policy at all—including the "no-reciprocity" policy actually being applied—then it seems clear that the Act violates the due process prohibition recently announced in the prevailing opinion of this Court in *Sweezey v. New Hampshire*, 354 U. S. 234, 255 (1957), against separation of legislative power from responsibility to direct its use. See also *Raley v. Ohio*, 354 U. S. 929 (1957); *Uphaus v. Wyman*, 355 U. S. 16 (1957).

On the other hand, if a more limited interpretation be placed upon the Act, namely, that the State Legislature conferred upon Appellee and the other State officials only the limited discretion to determine on a case by case

basis, whether a particular state qualified for a reciprocity agreement as one "which levies a highway use tax in addition to motor vehicle regislation fees", then the adoption by Appellee and the other officials concerned of the fixed, inflexible and non-discretionary "no-reciprocity" policy as to the axle-mile tax represents an arbitrary and perverted exercise of power, nullifying such limited intent of the State Legislature. It constitutes an abuse of power precisely like that of the Board of Supervisors in *Yick Wo v. Hopkins,* 118 U. S. 356 (1886) which, under a laundry-licensing ordinance valid on its face, refused to license any Chinese whatever, thereby causing this Court to strike down the ordinance, as thus arbitrarily administered, as in violation of the Fourteenth Amendment.

Moreover, imposition of the extremely burdensome and financially prohibitive axle-mile tax on the basis of such "no-reciprocity" policy operates to deprive Alger and others similarly situated of property in violation of the most fundamental of due process requirements, namely, notice and hearing. The Motion in this connection merely states, without any citation of authority, that "nothing in the nature of the problem requires that the Ohio Reciprocity Board confer with Appellant or give Appellant an opportunity to be heard, before deciding whether a particular reciprocity agreement would be in the best interest of the State of Ohio" (Motion, p. 7).

If this statement is intended to mean that the making of a reciprocity agreement does not require notice and hearing because it does not directly command action by, or otherwise directly affect Alger, then it flies in the face of many due process decisions of this Court. As the Court said in *Anti-Fascist Committee v. McGrath,* 341 U. S. 123 (1950)—

> "We long have granted relief to parties whose legal rights have been violated by unlawful public action **although such action made no direct demands upon them.** *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Pierce v. Society of Sisters*, 268 U. S. 510; *Buchanan v. Warley*, 245 U. S. 60; *Truax v. Raich*, 239 U. S. 33." (341 U. S. at 141.) (Emphasis ours.)

The above statement in the Motion may be meant to imply that notice and hearing is not required because the "no reciprocity" policy involves a purely "legislative" rather than a quasi-judicial, determination that Ohio will collect more revenue under such policy. If so, we point out that even if Appellee and the other Ohio officials need not have granted notice and hearing with respect to their "legislative function" in *adopting* the "no-reciprocity" policy itself, it certainly cannot be contended that the specific *application* of the policy to one directly affected thereby can validly be effected without notice and hearing. Since Alger was directly affected by the refusal of the Ohio officials to sign the proffered reciprocal exemption agreement actually tendered by Michigan (R. 12-16; 66-75), the Ohio officials were required by the Fourteenth Amendment to afford Alger an opportunity to be heard, at least with respect to whether such particular application of the "legislative" policy would be to the ultimate best interests of the State of Ohio, even at the expense of destroying interstate commerce. Cf. *Southern Railway Co. v. Virginia*, 290 U. S. 190 (1933).

This Court, throughout its history, has narrowly limited those types of situations regarded as so entirely "legislative" as to obviate the need for notice and hearing to parties adversely affected. As stated by Mr. Justice Frankfurter in his concurring opinion in *Anti-Fascist Committee v. McGrath, supra:*

> "The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness." (341 U. S., at 167.)

And while this Court has ruled that notice and hearing may not be constitutionally requisite on the question of whether property is needed for a public use, *Rindge Co. v. Los Angeles,* 262 U. S. 700 (1923), it has nevertheless held that in decisions involving local taxation for improvements, owners must be given a hearing on valuation as well as on the question of whether their property has been benefited, whenever that determination has not been legislatively made. See, e. g., *Embree v. Kansas City Road District,* 240 U. S. 242 (1916); cf. *Anniston Mfg. Co. v. Davis,* 301 U. S. 337 (1937). This Court has also ruled that even where an individual's interest is created *ex parte,* it may not be destroyed "without that character of notice and opportunity to be heard essential to due process of law," *United States ex rel. Turner v. Fisher,* 222 U. S. 204, 208 (1911); *Garfield v. United States,* 211 U. S. 249 (1908). As appears in a concurring opinion in *Anti-Fascist Committee v. McGrath, supra,*

> "Even if the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important." (341 U. S. at 166.)

The Motion takes the position that Michigan does not levy a highway use tax, and that "the so-called Michigan highway use tax is in reality a public utility fee • • •" (Motion, p. 7). But the Supreme Court of Ohio has expressly ruled to the contrary. In the earlier related case involved in this appeal, namely *Interstate Motor Freight System v. Bowers* and *Geo. F. Alger Co. v. Bowers,* 164

Ohio State 122, 128 N. E. (2d) 97 (July 27, 1955), that Court described the Michigan tax in question as "a 'third structure' tax, to wit, mileage fees" (J. S. Appendix A, 16a), and referred to it as "a mileage tax from which Ohio carriers are by the agreement exempted" (J. S. Appendix A, 22a). It is futile for Appellee, in an effort to belittle the substantial constitutional issue here involved, now to attempt to characterize as merely "a public utility fee" the Michigan tax which the highest court of the State of Ohio has ruled to constitute a "third structure" highway use tax comparable to the Ohio highway axle-mile tax.*

While, as above noted, our major contention with respect to the second constitutional question lies in the Due Process requirements of the Fourteenth Amendment, the "no-reciprocity" policy also raises a substantial Commerce Clause question. The Ohio Legislature in enacting Ohio Rev. Code, Sec. 5728.15, with its express authority for reciprocal agreements, manifestly intended thereby to eliminate the burden of the Ohio Axle-Mile Tax Law upon interstate commerce. Adoption of the "no-reciprocity" policy, defeating this legislative purpose, presents a serious question, of national importance, as to whether the Ohio Axle-Mile Tax Law, in view of the excessively large amounts of tax involved, constitutes an unreasonable burden upon interstate commerce through inevitable substantial multiple taxation upon interstate carriers. This point is discussed in the dissenting opinion in the *Brice* case, *supra*, as follows:

> "When a privilege tax is relatively small in amount, and therefore to be treated as a rough

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*The Michigan tax in question is listed among "third structure" highway use taxes comparable to the Ohio Axle-Mile Tax in the Staff Report to the Committee on Interstate and Foreign Commerce, "State Taxation of Interstate Trucking and the Reciprocity Problem", House Document No. 449, 84th Cong. 2nd Sess., July 16, 1956, at pp. 12-15.

> equivalent for what the State may exact with due regard to administrative practicalities, the danger of an unfair burden falling upon interstate commerce remains correspondingly small. Cf. *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 210-11. But a large privilege tax presents dangers not unlike those arising from unapportioned gross receipts taxes on interstate transportation beyond a State's power to impose. Cf. *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653." (339 U. S. at 558.)

Commentators have noted that the "no-reciprocity" policy under the Ohio Axle-Mile Tax Law has stirred up a storm of controversy between Ohio and other states. See *Note, The Ohio Axle-Mile Tax,* 23 U. of Cinn. Law Rev. 442, 446-447 (1954), referring to *Double Trouble on Truck Tax,* Business Week, June 28, 1954, p. 28. The arbitrary position taken by Ohio has already resulted in retaliatory taxation of interstate motor carrier commerce by more than 17 states (See Staff Report on Committee on Interstate and Foreign Commerce, House Document No. 449, 84th Cong., 2nd Sess., July 16, 1956, p. 3), with application of certain of these retaliatory levies being withheld pending the outcome of this appeal. This constitutes the greatest threat to the flow of interstate motor carrier commerce which the nation has ever faced, and in itself raises a substantial constitutional question, meriting full review.

CONCLUSION

The constitutional questions presented are novel and most substantial, meriting plenary consideration, with briefs on the merits and oral argument before this Court. The Motion to Dismiss this appeal should be denied and probable jurisdiction noted.

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Dated: July 2, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 65

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

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SUBJECT INDEX

Page

1. No court has passed upon the constitutional issues raised herein by applying the facts of record in this case against the tests of constitutionality or unconstitutionality as prescribed by this Court in its decision in Capitol Greyhound Lines v. Brice, 339 U. S. 542 (1950) 2-9

2. The arbitrary "no-reciprocity" policy adopted by Ohio state officials in abrogation of the express provision for reciprocal exemption agreements inserted by the State Legislature in the Ohio Axle Mile Tax Law is an unconstitutional denial of due process. Dismissal of this appeal is contrary to Cooper v. Aaron in denying all judicial relief to appellant for violation of fundamental Fourteenth Amendment due process rights by officials and courts of the State of Ohio 9-13

3. Dismissal of this appeal on the Commerce Clause issues is contrary to Capitol Greyhound Lines v. Brice. A departure from constitutional principles should not occur without argument and a decision on the merits 13-15

4. Dismissal without determination by this Court of the constitutionality of the Ohio Axle Mile Tax Law will result in chaos in the trucking industry, a multiplicity of litigation and a destructive interstate highway tax war 15-17

INDEX TO AUTHORITIES CITED

Cases

	Page
Capitol Greyhound Lines v. Brice, 339 U. S. 542; 70 S. Ct. 806	2, 4, 8, 13
Cooper v. Aaron, 358 U. S. —	9, 13
Geo. F. Alger Co., et al. v. Bowers, Tax Commissioner, 164 O. S. 122, 166 O. S. 427	4, 5, 7
Geo. F. Alger v. Peck, 119 Fed. Supp. 812; 74 S. Ct. 605, 347 U. S. —; 74 S. Ct. 853, 347 U. S. 984	3
Noerr Motor Freight, Inc. v. Eastern Railroad President's Conference, 155 F. Supp. 768 (E. D. Pa. 1957)	15
Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 303-305 (1936)	12
Peters v. Hobby, 349 U. S. 331, 345 (1955)	12
Southern Railway Co. v. Virginia, 290 U. S. 190, 197-198 (1933)	12
State ex rel. Interstate Motor Freight System v. O'Neill, 167 O. S. 139, 146 N. E. 2d 720	11
Yick Wo v. Hopkins, 118 U. S. 386 (1886)	11
West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U. S. 63, 68-69 (1934)	12

Statutes

Motor Carrier Act, 49 U. S. C. A. 301	2
Ohio Axle Mile Tax Law, Secs. 5728.01 to 5728.15, Revised Code of the State of Ohio	2, 9
U. S. C. A., Title 28, Sec. 1341	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 65

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

Appellant urgently and respectfully prays that this Court grant rehearing in the entitled proceeding as to its order dated October 13, 1958 dismissing this appeal.

The urgency of the situation covered by this petition is premised upon the fact that this Court's decision dismissing this appeal, unless reversed, will not only seriously and adversely affect appellant and its ability to carry on its exclusively interstate commerce operations as required by authority issued by the Interstate Commerce Commission, but it will likewise directly and indirectly seriously and adversely affect all other motor carriers transporting interstate and foreign commerce between points over Federal aid highways as authorized and required by certifi-

cates of public convenience and necessity and permits issued by the Interstate Commerce Commission under the applicable provisions of the Motor Carrier Act, 49 U. S. C. A. 301, *et seq.* In addition, private motor carriers of property will likewise be seriously and adversely affected in their ability to maintain operations. If the dismissal stands, every shipper and receiver of shipments of property moving in interstate or foreign commerce between points in these United States will be seriously and adversely affected. In other words, the decision in the instant case is of vital and utmost importance to the overall economy of this nation.

1. NO COURT HAS PASSED UPON THE CONSTITUTIONAL ISSUES RAISED HEREIN BY APPLYING THE FACTS OF RECORD IN THIS CASE AGAINST THE TESTS OF CONSTITUTIONALITY OR UNCONSTITUTIONALITY AS PRESCRIBED BY THIS COURT IN ITS DECISION IN CAPITOL GREYHOUND LINES v. BRICE, 339 U. S. 542 (1950).

This is not the first time the Ohio Axle Mile Tax Law (Sections 5728.01 to 5728.15, Revised Code of the State of Ohio) has been before this Court. Upon enactment of the Law and prior to the effective date thereof, certain parties including appellant, believing that they did not have "* * * a plain, speedy and efficient remedy * * * in the courts of * * *" the State of Ohio within the meaning of 28 U. S. C. A. Section 1341 instituted an action before a three-judge United States District Court, Southern District of Ohio, Eastern Division, seeking to restrain enforcement of the law. The State of Ohio filed a motion to dismiss on the basis that the plaintiffs therein "had a plain, speedy and efficient remedy in Ohio courts" within the meaning of 28 U. S. C. A. Section 1341. The three-judge Court, in a divided opinion, (Circuit Judge Allen dissenting) granted the motion to dismiss so filed by the State of Ohio (see 119 F. Supp. 812).

Subsequent to the foregoing decision of the three-judge Court, appellants in the cited case appealed the decision to this Court at which time they sought a temporary injunction pending this Court's disposition of such appeal (see 74 S. Ct. 605; 347 U. S. —). Mr. Justice Reed in a written opinion denied the motion for a temporary restraining order on the grounds, first, that "It is immaterial that here there are sixty parties * * *. Their motion is to be considered as though only one movant sought an injunction" and, second, that there existed within the meaning of 28 U. S. C. A. Section 1341 "an adequate remedy to appellants" in the courts of the State of Ohio "which they have not yet exhausted".

The appeal was dismissed upon the motion of the State of Ohio which was likewise based upon the provisions of 28 U. S. C. A. Section 1341, *supra,* the decision being a *per curiam* decision of this Court dated June 1, 1954 (see 74 S. Ct. 853; 347 U. S. 984).

At that time this Court contemplated that it would ultimately determine the constitutional issues. The opinion in chambers of Mr. Justice Reed on a motion for injunction pending appeal (see 74 S. Ct. 605 at 607) concluded with the statement that appellant and other carriers should have a final adjudication of the issues by following the "required state procedure, rather than to determine the federal issues primarily in the federal courts". Far from indicating that there was no substantial federal question, this Court's *per curiam* opinion, affirming the denial of a federal injunction under 28 U. S. C. A. §1341, contained the notation that "Mr. Douglas is of the opinion probable jurisdiction should be noted and the case set for argument." (74 S. Ct. 853, 347 U. S. 984.)

By reason of the foregoing decision of this Court, it was determined in further attempting to challenge the

constitutionality of the law, confusion would be minimized through the selection of representative assessments levied under the applicable provisions of the aforesaid Ohio Axle Mile Tax Law. Accordingly, certain representative assessments were caused to be made by the Tax Commissioner as to which protests were made by the parties assessed. In the protests, among other things, it was alleged that the law, for the various reasons set forth in this appeal, was unconstitutional on the facts and, in addition, the outstanding reciprocity agreement entered into between the States of Michigan and Ohio was applicable to said tax. This case was finally reported in the decision of the Supreme Court of Ohio in 164 O. S. 122. The Tax Commissioner, as set forth at pages 124-126 of that Supreme Court decision, *supra,* found that the aforesaid reciprocity agreement was not applicable to the Ohio Axle Mile Tax and that "As to the constitutional question raised by the petitioner, the Tax Commissioner finds that he is without jurisdiction to set aside the acts of the Legislature on the grounds that they are unconstitutional". Thereupon, appeal of the Tax Commissioner's decision was perfected to the Board of Tax Appeals for the State of Ohio which is just another division of the Department of Taxation of the State of Ohio.

The parties appellant in such proceeding before the Board of Tax Appeals went to great expense in the employment of outstanding engineers and certified public accountants who prepared and presented of record factual proof which complied with the requirements of the decision of this Court in the case of *Capitol Greyhound Lines v. Brice,* 339 U. S. 542; 70 S. Ct. 806, decided May 15, 1950. There it was established that each case is to be determined on its own facts and tests to be met by such facts are set forth at page 547 of such decision as follows:

> "Upon this type of reasoning rests our general rule that taxes like that of Maryland here *are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads.*
>
> "Our adherence to existing rules does not mean that *any group of carriers is remediless* if the total Maryland taxes are out of line with fair compensation due to Maryland. *Under the rules we have previously prescribed, such carriers may challenge the taxes as applied, and upon proper proof obtain a judicial declaration of the invalidity as applied.*" (Emphasis supplied.)

Although the Ohio Board of Tax Appeals affirmed the decisions of the Tax Commissioner in the cases involved, the Supreme Court of the State of Ohio, upon appeal, held under date July 27, 1955, in its decision in the case of *Geo. F. Alger Company, et al., appellants, v. Bowers, Tax Commissioner, appellee,* (164 O. S. 122) at page 134 as follows:

> "Having determined that the 1937 reciprocity agreement between the States of Ohio and Michigan is in force and effect, it will not be necessary to pass upon the constitutional questions raised by the appellants. It is a well established rule of law that where a case can be determined upon any other theory than that of the constitutionality of a challenged statute, *no consideration will be given to the constitutional question.*" (Emphasis supplied.)

A petition for reconsideration of this decision subsequently filed by the State of Ohio was denied by the Supreme Court of Ohio. This decision of the Supreme Court of Ohio precluded the State from collecting millions of dollars in taxation while at the same time permitted the preservation of existing service rendered by the affected interstate carriers, including appellant.

Subsequent to the said decision of the Supreme Court of Ohio, the Ohio state officials, authorized to enter into reciprocity agreements with other states, purported to cancel all outstanding reciprocity agreements with all other states.

In order to again attempt to secure a day in Court on the facts with respect to the constitutional issues involved, raised in the prior cases but undetermined, it was decided that an individual carrier would be selected to protest the assessments to be made by the Tax Commissioner. Assessments were made, one covering a quarter period prior to the purported cancellation of the reciprocity agreements and another a second quarter period subsequent to the purported date of cancellation. The Geo. F. Alger Company was selected as carrier against whom the test assessments would be made. The assessments made against appellant were for the second quarter of the year 1954 and the fourth quarter of the year 1955. Appellant protested the same upon the same constitutional grounds advanced in the case resulting in the July 27, 1955 decision of the Supreme Court of Ohio, *supra*, plus the additional ground that the state officers purporting to cancel the outstanding reciprocity agreements were without authority to so act. The Tax Commissioner affirmed his prior assessments. Thereafter, the said decisions of the Tax Commissioner were appealed to the Board of Tax Appeals of the State of Ohio and the decisions of the Board of Tax Appeals are set forth at pages 76 and 83 of the record in the entitled proceeding.

Again, appellant was required to present its factual evidence in accordance with the factual tests enunciated by this Court in the *Brice* case, *supra, to an administrative body, namely, the Board of Tax Appeals.* It was agreed

that the record presented before the Board in the first cases as covered by the decision of the Supreme Court of Ohio dated July 27, 1955, *supra*, be made a part of the record covering the appeal in the second proceeding (see record pages 6 and 7 in the entitled proceeding).

Subsequent to the hearing in the proceedings last discussed, the Board of Tax Appeals rendered its decisions referred to above (R. 76 and R. 83) affirming the decisions of the Tax Commissioner applicable to the assessments in question. *In these cases, as in the former cases, the Board held that "it, being a quasi-judicial body, must and does consider all sections of the Ohio Revised Code to be constitutional enactments"* (see R. 82 and R. 90). Thereafter, an appeal from said decisions of the Board of Tax Appeals was taken to the Supreme Court of Ohio. Again, in addition to other questions properly raised, the question of alleged unconstitutionality of the Ohio Axle Mile Tax Law, on the facts, as measured by the decision of this Court in *Capitol Greyhound Lines v. Brice, supra,* was properly presented to the Court. This factual presentation was made upon an extensive record which proved that the Ohio Axle Mile Tax Law produces compensation to Ohio which is far *"in excess of fair compensation for the privilege of using state roads" as to which the Federal Government pays federal aid for the construction and maintenance of the same in amounts as high as 90% of the total cost. Extensive evidence was presented to show that the Ohio Axle Mile "taxes are out of line with fair compensation due to" Ohio. Notwithstanding the terrific expense incurred in the development of the requisite evidence, the Supreme Court of Ohio with no consideration of the same upheld the decision of the Board of Tax Appeals by its decision dated June 19, 1957, cited 166 O. S. 427.*

Notwithstanding the clear and unmistakable language of this Court, quoted above from *Capitol Greyhound Lines v. Brice*, the Supreme Court of Ohio in commenting upon the aforesaid submitted evidence stated at page 428 of its decision that:

> "*This argument, although interesting, is one which would have better been directed to the General Assembly, since this court in determining the validity of the tax must confine itself to a determination of whether the tax is discriminatory, imposes an undue burden on interstate commerce and bears a reasonable relationship to the purpose for which it was created.*" (Emphasis supplied.)

But the federal constitutional questions referred to above under Brice, must be determined by considering the facts of record *in each case! This the Ohio Court did not do.*

The decision does not contain a scintilla of discussion of the extensive factual evidence presented in this case in accordance with the requirements and rules laid down by the decision of this Court in *Capitol Greyhound Lines v. Brice*. In other words, the decision of this Court dated October 13, 1958, in affirming the decision of the Supreme Court of Ohio, just cited, deprives appellant and others similarly situated of their vested right to have a full and complete hearing before this Court. Stated differently, if this petition for rehearing is not granted, appellant and the class which it represents will be actually deprived of any consideration by any court of the evidence submitted by it, which evidence meets the tests enunciated by this Court, in *Capitol Greyhound Lines v. Brice*. We humbly believe that this Court, upon reconsideration, will grant rehearing in this case. Otherwise, justice will not prevail.

Again, it is emphatically stated that no case before this Court involves issues of greater significance and im-

portance to the o erall national economy of this country of ours than do the issues in this case.

Therefore, it is respectfully submitted that out of all of the proceedings that have been instituted in connection with the Ohio Axle Mile Tax Law, as hereinbefore cited, *not one court has passed upon the evidence presented to meet the test enunciated by this Court in Capitol Greyhound Lines v. Brice.* This must be done, otherwise a reversal of the decision in that case will occur without anyone being advised in connection therewith.

In addition to the foregoing, it is submitted as follows:

2. THE ARBITRARY "NO-RECIPROCITY" POLICY ADOPTED BY OHIO STATE OFFICIALS IN ABROGATION OF THE EXPRESS PROVISION FOR RECIPROCAL EXEMPTION AGREEMENTS INSERTED BY THE STATE LEGISLATURE IN THE OHIO AXLE MILE TAX LAW IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS. DISMISSAL OF THIS APPEAL IS CONTRARY TO COOPER v. AARON IN DENYING ALL JUDICIAL RELIEF TO APPELLANT FOR VIOLATION OF FUNDAMENTAL FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY OFFICIALS AND COURTS OF THE STATE OF OHIO.

This appeal presents a clear-cut Fourteenth Amendment due process issue arising from application of the Ohio Axle Mile Tax to interstate vehicles in respect of which a highway use tax is paid to other sttaes.

The Ohio Legislature clearly, deliberately and unequivocally made express provision for reciprocal exemption agreements in Section 5728.15 of the Act (quoted in Jurisdictional Statement, Appendix B, p. 61a). The inclusion of this provision was a necessary condition precedent to the enactment of the Ohio Axle Mile Tax

Law, whether or not reciprocity was constitutionally required.

The clear objective of the Legislature was the exemption of out-state carriers, including Appellant, from all provisions of the Act, to be accomplished through reciprocity agreements between Ohio and the other qualified states of the nation. Multiple burdens upon interstate commerce were thus to be avoided.

But Appellee and the other Ohio State officials have taken it upon themselves arbitrarily to abrogate the reciprocal exemption agreement section of the Act, with the consequence that the underlying public policy of the State in enacting the section has been struck down, interstate commerce burdened, and the evil which the section was designed to prevent created.

They have arbitrarily and publicly announced, and have undeviatingly applied, a tough "no-reciprocity" policy—a fixed and inflexible determination never to make an Axle Mile Tax reciprocal agreement with any state.

They take the position that they have cancelled all reciprocal exemption agreements which Ohio had with many states, for the avowed purpose of attempting to insure that there would be no claim of exemption from the Axle Mile Tax; they have specifically refused to sign a reciprocal exemption agreement signed and tendered to Ohio by the State of Michigan in accordance with the Ohio Act.

The Michigan officials involved have in writing condemned such action as a denial of rights "by whim or caprice". And in H. Res. 407, 83rd Cong. 2nd Sess., such action was referred to by Congress as "discriminatory and unilateral."

Appellee Tax Commissioner admits that imposition of the challenged assessment on Appellant's Michigan- and

Indiana-registered vehicles arises wholly out of such "no-reciprocity" policy.

And in the decision appealed from the Supreme Court of Ohio ruled merely that the power conferred under the reciprocal exemption section was discretionary. That Court thus sanctioned this arbitrary administration of the Ohio Axle Mile Tax Law without judicial review or treatment of the "no reciprocity" policy, without any record or findings to show whether the exercise of the alleged "discretion" conferred was reasonable, and despite its effect of unconstitutionally burdening interstate commerce and restricting the exercise of federally granted rights and duties under Interstate Commerce Commission Certificates and Permits.

To complete the denial to interstate carriers of a day in court with respect to the Ohio Axle Mile Tax Law and the "no-reciprocity" policy under which it is being administered, the Supreme Court of Ohio has subsequently ruled against review thereof by way of mandamus. *State ex rel. Interstate Motor Freight System v. O'Neill,* 167 Ohio State 139, 146 N. E. 2d 720 (December 18, 1957).

Appellant has to date had no judicial review. That it has been denied due process of law in violation of the Fourteenth Amendment is clear.

In *Yick Wo v. Hopkins,* 118 U. S. 386 (1886), a laundry licensing ordinance, valid on its face, was held to have been rendered unconstitutional for lack of due process through its arbitrary administration by the Board of Supervisors shown to have refused to license any Chinese whatever. The inflexible "no-reciprocity" approach of appellee and other Ohio officials under the Ohio Axle Mile Tax Law represents an equally arbitrary abuse of power.

Appellee and the other State officials have contended throughout that they are not required to make any record

with respect to their application of this unlawful policy to the detriment of appellant and others similarly situated. This means that there is no record whatever as to the basis for, and no means of adequate judicial review of, the reasonableness of their exercise of the "discretion", which the Supreme Court of Ohio indicated was reposed in them. This also violates due process. *Southern Railway Co. v. Virginia,* 290 U. S. 190, 197-198 (1933).

In due process cases involving Ohio statutes, where only one court—the State Supreme Court—reviews administrative actions (as in the present case), this Court has particularly emphasized that a record showing of the reasonableness of administrative action is constitutionally essential to adequate judicial review. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292, 303-305 (1936); *West Ohio Gas Co. v. Public Utilities Commission of Ohio,* 294 U. S. 63, 68-69 (1934).

It is thus clear that the Act as so administered and interpreted by the courts of Ohio, and the assessment herein complained of, is rendered unconstitutional and void.

Through arbitrary action by appellee and other officials of the State of Ohio appellant has been deprived of its property in the form of millions of dollars of tax which would otherwise not be payable, and its Federally-granted right to operate under its Interstate Commerce Commission Certificate (which requires rendition of continuous service to the public) has been unconstitutionally restricted.

Appellant and others similarly affected have been summarily denied and refused protection by the Supreme Court of Ohio against precisely the kind of "administrative lawlessness" condemned by this Court in *Peters v. Hobby,* 349 U. S. 331, 345 (1955).

This Court's Order of October 13, 1958 dismissing the appeal herein thus denies to appellant its only opportunity for judicial review with respect to a deprivation by State officials and the courts of Ohio of fundamental due process rights guaranteed by the Fourteenth Amendment.

Such a result is utterly inconsistent with the unanimous pronouncement made on September 29, 1958, in the case of *Cooper v. Aaron*, 358 U. S. — (1958), as to the paramount duty of this Court to protect litigants against denial of their rights under the Fourteenth Amendment by action on the part of a state government, whether it be by officials or by the courts of the state. This Court there said that rights under the Fourteenth Amendment "can neither be nullified openly and directly by * * * state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously' ".

Where arbitrary action by State officials will operate, as here, to cripple or destroy not only appellant but many other interstate carriers, and will adversely affect the entire economy by imposition of an undue burden on interstate commerce, the due process issue is clearly of sufficient importance to bring into play the duty of this Court, reiterated in *Cooper v. Aaron*, "to say what the law is".

3. DISMISSAL OF THIS APPEAL ON THE COMMERCE CLAUSE ISSUES IS CONTRARY TO CAPITOL GREYHOUND LINES v. BRICE. A DEPARTURE FROM CONSTITUTIONAL PRINCIPLES SHOULD NOT OCCUR WITHOUT ARGUMENT AND A DECISION ON THE MERITS.

This Court's last pronouncement on the constitutional Commerce Clause limitations on state highway use taxation was in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950). This Court there adopted the principle that

whether a tax levied on interstate commerce, in theory for road use, exceeded fair compensation to the state for its share of the facilities furnished was a question of fact to be determined in each case on the basis of the record presented. Interstate carriers were assured that a record showing that state highway taxes exceeded fair compensation to the State would be considered by this Court "proper proof [to] obtain a judicial declaration of their invalidity as applied."

The record herein shows precisely this without any controverting proof. It shows that the Ohio Axle Mile Tax Law, itself involving approximately $20,000,000 per year, results in the total Ohio highway taxes for the year 1954 exceeding by more than $23,000,000 the revenues needed to finance the Ohio State highway program as adopted by the State. It shows that imposition of the tax upon appellant's exclusively interstate operations will cost appellant more than half a million dollars and turn its profits into a loss of more than $300,000, and will impose an annual Axle Mile Tax of up to $2,250 per vehicle, with total annual Ohio highway taxes of up to $4,262 per vehicle.

Moreover, the excessiveness of Ohio highway taxes is even greater now than at the time of enactment of the Act, by reason of the 1956 Federal Highway Aid Legislation under which the Federal Government now pays 90% of the cost of building and maintaining the interstate highways which alone are used by appellant in Ohio, with the State paying only 10%.

Brice established the principle that each case involving a Commerce Clause question of "fair compensation" or "unfair compensation" to a State would be determined on the facts *in each case*. Dismissal of this Appeal will overrule Brice, that each case is to be determined on its own facts, without argument or opinion.

Dismissal of this appeal, presenting precisely the kind of record which this Court in the *Brice* case said would warrant a judicial declaration of invalidity of highway use taxes applied exclusively to interstate carriers, radically changes the rules of constitutional law, without affording to the motor carrier industry, and to the public which will be adversely affected, the benefit of argument, discussion, and consideration by this Court and guidance for the future.

4. DISMISSAL WITHOUT DETERMINATION BY THIS COURT OF THE CONSTITUTIONALITY OF THE OHIO AXLE MILE TAX LAW WILL RESULT IN CHAOS IN THE TRUCKING INDUSTRY, A MULTIPLICITY OF LITIGATION AND A DESTRUCTIVE INTERSTATE HIGHWAY TAX WAR.

In *Noerr Motor Freight, Inc. v. Eastern Railroad President's Conference*, 155 F. Supp. 768 (E. D. Pa. 1957) a federal district court, describing a gigantic conspiracy between the railroads and the Byoir public relations firm for the promulgation in many states of legislation aimed at injuring the motor carrier industry, found that the Ohio Axle Mile Tax Law was one "of the outstanding accomplishments of Byoir for the railroads in the entire campaign", involving the furnishing to representatives of the Ohio Legislature of "slanted statistics" (155 F. Supp., at 784-786). Dismissal of the appeal herein may serve to accomplish the disruption of the motor carrier industry.

Prosecution of assessment cases under the Ohio Axle Mile Tax Law totalling many millions of dollars has been delayed awaiting the decision of this Court on the constitutional issues. The order of dismissal denies such a decision with no indication of this Court's thinking on these substantial questions. Since collection of such as-

sessments would bankrupt many interstate motor carriers, it is fair to assume that they will not submit without a prior adjudication of these issues on their merits. A multiplicity of burdensome litigation would thus be necessary for the motor carrier industry to obtain answers to these questions involving life or death for many of its members, all of which could be avoided by this Court hearing and determining this appeal on the merits.

The record below shows that Michigan has already expressly warned Ohio of the "dire consequences which you will automatically invoke by" the "no-reciprocity" policy. A 1956 Congressional Committee Staff Report (House Doc. No. 449, 84th Cong., Second Sess.) shows that more than 17 states have readied procedures for retaliatory taxation of interstate motor carrier commerce, with application of certain of these retaliatory levies against Ohio being withheld pending the outcome of this appeal.

An interstate highway tax war, obstructing the flow of commerce among the states, with a multiplicity of heavy state taxes imposed on interstate vehicles, can disrupt the entire economy of the country which is so dependent today upon interstate motor transportation. Such consequences ought not to be allowed to occur without a determination by this Court of the substantial constitutional issues.

Certainly, the constitutional issues herein cannot be deemed frivolous or completely predetermined by earlier decisions. Moreover, if the issues are deemed properly presentable by certiorari, this appeal should be so considered under §2103 of the Judicial Code. In any event, argument and a decision on the merits is most urgently called for.

CONCLUSION

Wherefore, Appellant prays that this Court grant this Petition for Rehearing in respect of its Order of October 13, 1958 dismissing the appeal herein, and that probable jurisdiction be noted.

Respectfully submitted,

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I hereby certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay.

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